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Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

against

NEW YORK MEDICAL COLLEGE, INC., KARL P. ADLER,
M.D., PHILIP HENIG, M.D., and KURT ALTMAN,
M.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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December 3, 1987

6186



QUESTIONS PRESENTED

- (1) Was New York Medical College, by reason of its affiliation agreement with the New York City Health and Hospitals Corporation (HHC) in regard to the City-owned Metropolitan Hospital, a State actor, for Fourteenth Amendment purposes, so that it was not free to discriminate against petitioner by discharging him in violation of that Amendment's Equal Protection Clause?
- (2) If the answer to Question (1) is Yes, did the Medical College's discharge of petitioner, if motivated by discrimination against him because he is a heterosexual, violate the Equal Protection Clause?

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW
YORK SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT

Petitioner, Stanislaw Konarski, M.D., re-
spectfully requests that a writ of certiorari
issue to review the judgment of the New York
Supreme Court, Appellate Division, First De-
partment, entered in this proceeding April 7,

1987 (App. 13a-14a). The Appellate Division's action, an affirmance without opinion, is reported at 129 A.D. 2d 1018, 513 N.Y.S. 2d 905 (1st Dep't 1987).

The judgment it affirmed (App. 9a-12a) was entered November 19, 1985, upon an opinion filed October 7, 1985, by Eugene R. Wolin, a Justice of the New York Supreme Court, New York County, Special Term, Part I. This opinion (App. 1a-8a) was published only in the New York Law Journal, vol. 194, no. 77, October 18, 1985, p. 12, col. 2.

The Appellate Division denied a motion for leave to appeal to the Court of Appeals on June 9, 1987 (App. 15a-16a).

Acting pro se, petitioner filed in the New York Court of Appeals a motion for leave to appeal to that Court, which that Court denied (App. 17a-18a) on September 15, 1987, without opinion. This denial is reported at 70 N.Y. 2d 606. 514 N.E. 2d 388, 519 N.Y.S. 2d xcvi (1987).

JURISDICTION

The judgment of the New York Court of Appeals was entered on September 15, 1987. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1 (two clauses):

[N]or shall any State deprive any person of life, liberty, or property, without due process of law;
nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Health and Hospitals Corporation Act,

N.Y. Laws 1969, ch. 1016,

§§ 2 (in fine), 4(1), 5(8), 6(1)(a, b),

65 McKinney's (Unconsolidated Laws)

§§ 7382 (in fine), 7384(1),
7385(8), 7386(1)(a, b)

(copies at pp. 19a-27a of Appendix herein).

STATEMENT OF THE CASE

Petitioner, a physician, was employed at Metropolitan Hospital -- a municipal hospital then and now owned by New York City -- from 1958 to 1981. Between 1958 and 1968 he was employed by the City, which then itself administered Metropolitan Hospital. Between 1968 and 1981 he continued to perform the same services at Metropolitan Hospital, but, during this period, his employer was New York Medical College, a private corporation, which administered Metropolitan Hospital under a series of affiliation agreements, at first with the City, and then with the New York City Health and Hospitals Corporation (HHC), a public benefit corporation created in 1969 by State statute (N.Y. Laws 1969, ch. 1016, 65 McKinney's N.Y. Unconsolidated Laws §§ 7381-7406 (1979)). The sections of this statute -- the New York City Health and Hospitals Corporation Act, herein after cited appear at pp. 19a-27a of the

That statute provides that "the exercise by such corporation of the functions, powers and duties hereinafter provided constitutes the performance of an essential public and governmental function (§ 2 (in fine); § 7382 (in fine)). The act declared HHC "a body corporate and politic, constituting a public benefit corporation" (§ 4(1); § 7384(1)), whose board of directors consisted entirely of City officials and mayoral appointees. The statute directed the City expeditiously to enter into contracts with HHC "whereby the corporation shall operate the hospitals then being operated by the city" (§ 6(1)(a, b); § 7386(1)(a, b)).

The clause authorizing HHC to enter into affiliation agreements with private corporations such as New York Medical College whereby the latter would operate municipal hospitals such as Metropolitan is found in the section enumerating corporate powers, i.e.,

"To provide health and medical services for the public directly or by agreement or lease with any person, firm or private or public corporation or association, through and in the health facilities of the corporation . . . " (§ 5(8); § 7385(8)).

The affiliation agreement between HHC and New York Medical College which was in force in 1981 at the time of petitioner's discharge contained a clause (§ 5.07) which in relevant part provided:

The Affiliate [i.e., New York Medical College] agrees that it will not discriminate against any employee or applicant for employment or promotion because of age, race, creed, color, sex, sexual orientation, or place of national origin, and will abide by the Corporation's rules and regulations concerning non-discrimination.

(R. 270 (emphasis added))

In his deposition, taken at respondents' instance, petitioner referred to the foregoing clause in his testimony as follows:

The City has got a rule that if it gives a contract to somebody to do certain work for the City as in the

case of New York Medical College doing work for the City and providing medical staff for Metropolitan Hospital, that New York Medical College will not discriminate.

(R. 673)

Notwithstanding this clear text, the courts below made no reference to it. The trial court was the only one that wrote an opinion. In his order entered November 22, 1985 the trial judge recited that he had read the "exhibit attached" to the "reply affidavit of Marc Weinberger" (R. 6). Marc Weinberger was the senior associate dean of New York Medical College in charge of affiliations. The exhibit attached to Dean Weinberger's affidavit, which Justice Wolin recited that he read, contains the affiliation agreement in which the above quoted § 5.07 appears.

In the fiscal year in which petitioner was discharged, HHC's spending rate on Metropolitan Hospital, under HHC's affiliation agreement with New York Medical College, was \$11,000,000 (R. 230).

Despite the nondiscrimination clause in the affiliation agreement, HHC, as of June 30, 1981, discharged plaintiff in pursuance of discrimination against him, because of his heterosexual orientation, by a homosexual clique.

In June 1984 petitioner brought suit against New York Medical College and three doctors at Metropolitan Hospital involved in his discharge (Drs. Adler, Henig, and Altman). These four defendants are still in the case, and are respondents herein. Originally there were also three other defendants (HHC, Metropolitan Hospital Center, and Richard D. Levere, M.D.). The trial judge dismissed them from the suit.

Respondents, in an identical paragraph 58 of their verified answers (R. 57, 73, 88, 103), all pled:

The Medical College, as a private employer, employed plaintiff on a part-time basis from March 11, 1968 through June 30, 1981.

In his opinion filed October 7, 1985, Justice Wolin accepted respondents' contentions and granted their motion for summary judgment.

In one passage, he ignored § 5.07 of the affiliation agreement, writing:

Plaintiff's reliance upon the affiliation agreements between HHC and the [New York Medical] College is misplaced. Nothing in those agreements relates to the terms and conditions of his employment.

(R. 11; App. 4a)

Another passage in his opinion is fraught with mistake:

While plaintiff's private sexual practices enjoy a measure of protection from government regulation (People of the State of New York v. Onofre, 51 N.Y. 2d 476 [1980]), that protection has not been extended to eliminate discrimination in the employment practices of private industry.

(R. 11; App. 4a)

The Onofre case was about sexual acts, not sexual orientation. The instant case is about sexual orientation, not sexual acts.

More important, however, is the trial court's mischaracterization of New York Medical College, in regard to its employment practices at Metropolitan Hospital, under its affiliation agreement with HHC, as a "private industry". In respect of those matters, the Medical College is a State actor, bound by the Fourteenth Amendment's Equal Protection Clause. Once this is realized, the remainder of Justice Wolin's opinion, though it contains many statements of law that are correct (e.g., New York has not recognized a cause of action for wrongful termination of an employment at will: either party may terminate it for any reason or none) becomes irrelevant. Those statements pertain to State law, as applied to private parties, not to State actors under the Fourteenth Amendment.

The balance of this petition will discuss the two Questions Presented (State action & scope of equal protection) and a third Reason for Granting the Writ.

(1)

WAS NEW YORK MEDICAL COLLEGE, BY REASON OF ITS AFFILIATION AGREEMENT WITH HHC IN REGARD TO THE CITY-OWNED METROPOLITAN HOSPITAL, A STATE ACTOR, FOR FOURTEENTH AMENDMENT PURPOSES, SO THAT IT WAS NOT FREE TO DISCRIMINATE AGAINST PETITIONER BY DISCHARGING HIM IN VIOLATION OF THAT AMENDMENT'S EQUAL PROTECTION CLAUSE?

Three leading precedents of this Court, all brought to the attention of the courts below, are applicable: Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Perry v. Sindermann, 408 U.S. 593 (1972); and Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

Burton turned on the Equal Protection Clause; the two later cases on the Due Process Clause. They involved discharges from employment; Burton did not. In Burton and Perry, the challenger won; in Rendell-Baker she lost. In the first two cases the action claimed to be State action occurred on State-owned property; in the third it occurred on privately owned property. In petitioner's view, the distinction last noted is crucial in explaining the difference in results.

In Burton the Parking Authority had been created by Delaware statute as "a public body corporate and politic, exercising public powers of the State" (365 U.S. at 717; cf. § 2 of the New York City Health and Hospitals Corporation Act, App. 12a). In Burton, the Authority's lease to the restaurant contained "no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis" (365 U.S. at 720), although the Court pointed out that in its lease to the restaurant the Authority "could have affirmatively required Eagle [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of State participation" (365 U.S. at 725). In the case at bar, HHC did insert a nondiscrimination clause (§ 5.07) into its affiliation agreement with the Medical College, aimed directly at the latter's employment practices at Metropolitan Hospital.

In Burton the Delaware Supreme Court had held that the restaurant, "in the conduct of its business is acting in a purely private capacity" (365 U.S. at 721). Nevertheless, this Court held:

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code §§ 501, 514.

(365 U.S. at 723)

Certainly the same can be said of Metropolitan Hospital!

The Burton Court proceeded:

The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

(365 U.S. at 725)

The Burton Court concluded: "the proscriptions of the Fourteenth Amendment

must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself" (365 U.S. at 726).

The only discernible distinctions between Burton and the case at bar tell more strongly in favor of State action than in Burton: (1) the absence of an express discrimination clause in the lease in Burton, contrasted with the presence of such a clause in the affiliation agreement here; (2) in Burton the restaurateur's activity was different from that of the Authority (running a parking garage), whereas here the Medical College was performing the very same activity (running Metropolitan Hospital, hiring and firing its medical staff) that, in the past, the City itself had performed.

In Perry v. Sindermann, the first question presented was whether Professor Sindermann's "lack of a contractual or tenure right

to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments", to which this Court replied: "We hold that it does not" (408 U.S. at 596). After discussing precedents from the previous quarter of a century, this Court concluded: "Thus, [Professor Sindermann's] lack of a contract or tenure 'right' to re-employment for the 1969-70 academic year is immaterial to his free speech claim" (408 U.S. at 597-98).

The Perry Court noted that Professor Sindermann "has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment [against Sindermann] . . . For this reason, we hold that the grant of summary judgment against [Sindermann], without full exploration of this issue, was improper" (408 U.S. at 598).

The only discernible distinction between Professor Sindermann's case and Dr. Konarski's is that the unconstitutional motive which Sindermann alleged was to punish him for exercising a First Amendment right, whereas the one petitioner seeks the opportunity to prove is a Fourteenth Amendment Equal Protection Clause right infringement -- the motive to discriminate against him through termination of employment because of his heterosexuality. This distinction should surely make no Constitutional difference.

Professor Sindermann's employment was on a year-to-year periodically renewable (or nonrenewable) basis, whereas Dr. Konarski's was an employment at will. But Sindermann's nonrenewal became effective at the end of one of his one-year periods, at which point he, too, became an immediately dischargeable employee, for any reason or none, as a matter of State law, just like an employee at will.

Petitioner submits that the combined teaching of Burton and Perry calls for reversal and remand of the judgment below.

In Rendell-Baker v. Kohn, Chief Justice Burger commenced the substantive portion of his Opinion for the Court thus:

Respondent Kohn is the director of the New Perspectives School, a nonprofit institution located on privately owned property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officers or are chosen by public officials.

(457 U.S. at 831-32 (emphasis added))

Later in his Opinion, distinguishing Burton, he noted that

The [Burton] Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage.

(457 U.S. at 842-43 (emphasis added))

The two facets of the sentence just quoted will be discussed in turn.

In Burton and in the case at bar, but not in Rendell-Baker, publicly-owned property was the situs of the unconstitutional action under challenge. New York Medical College owns private property in Valhalla, New York, where it maintains and operates the medical college proper. If it were to discharge an employee there, whose employment was not covered by an affiliation agreement (containing a nondiscrimination-in-employment clause) with HHC, such a discharge would raise no constitutional questions, if the employee were one at will. That case would be governed by Rendell-Baker. But New York Medical College has entered into affiliation agreements with HHC under which it operates two municipal hospitals, Lincoln and Metropolitan. In regard to its employment practices on those premises, the Medical College is a State actor, and is governed by Burton and Perry.

The distinction between publicly and privately owned property is of Constitutional dimensions in other areas as well, e.g.,

the Establishment Clause of the First Amendment as it applies to religious activities in or connected with public schools. Cf. Zorach v. Clauson, 343 U.S. 306 (1952)(released time for public school students' religious instruction outside school premises not unconstitutional), with Engel v. Vitale, 370 U.S. 421 (1962)(prayer in public schools unconstitutional, if publicly prescribed and imposed).

The second point in Chief Justice Burger's sentence distinguishing Burton is that Eagle Restaurant's rental payments went to support the garage, and that thus the Parking Authority profited from Eagle's discrimination. Here, of course, the flow of money was in the opposite direction. But the affiliation agreement, like most agreements, was a two-way street. Money flowed from HHC to the Medical College, but, in return, the Medical College relieved HHC and the City of the burden -- which the City had borne in prior years -- of running Metropolitan Hospi-

tal. When the New York State Legislature in 1969 passed the act setting up HHC and authorizing it to enter into affiliation agreements with private entities, it must have thought that such agreements would be advantageous, from HHC's point of view, and HHC itself, when later on it entered into such an agreement with the Medical College, must also have considered it advantageous. Thus it can be said here, as the Court said in Burton, that the allegedly "private" discrimination enures to the profit or advantage of the public entity.

As Rendell-Baker, and Burton itself, point out, a careful sifting of all the facts is needed to draw the line between State and private action in Fourteenth Amendment cases. No mechanical formula will suffice. Petitioner submits that, on any careful sifting of facts in the case at bar, the outcome here should parallel that in Burton and Perry, and that Rendell-Baker is clearly distinguishable.

(2)

IF NEW YORK MEDICAL COLLEGE WAS A STATE ACTOR FOR FOURTEENTH AMENDMENT PURPOSES, DID THE MEDICAL COLLEGE'S DISCHARGE OF PETITIONER, IF MOTIVATED BY DISCRIMINATION AGAINST HIM BECAUSE HE IS A HETEROSEXUAL, VIOLATE THE EQUAL PROTECTION CLAUSE?

Cases alleging discrimination on the basis of sexual orientation have hitherto pitted homosexual discriminatees against heterosexual discriminators. Dr. Konarski appears to be the first heterosexual to bring suit based on reverse sexual-orientation discrimination. Whether cases of ordinary sexual-orientation discrimination, and those of the reverse sort, should be governed by the same principles, is a question of interest, which has scarcely been discussed. It need not, however, be decided in the case at bar.

Even in cases involving homosexual acts, courts have reached discordant results. Cf. Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (no Federal Constitutional privacy right of

homosexuals to engage in private adult homosexual conduct), with People v. Onofre, 51 N.Y. 2d 476, 415 N.E. 2d 936, 434 N.Y.S. 2d 947 (1980) (opposite result under New York State constitution). So it is, perhaps, not surprising to find a similar conflict among courts in cases based on homosexual orientation. Cf. Padula v. Webster, 822 F. 2d 97 (D.C. Cir. 1987), with High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

Both those cases involved claims of discrimination against homosexuals in the noncriminal sphere. The Padula court held that homosexuals are not a suspect class for Equal Protection Clause purposes; the High Tech Gays court held that homosexuals are a quasi-suspect class for the same purposes. Eventually this conflict will be resolved, doubtless by a decision of this Court, but it need not be decided in the case at bar.

For, whatever the right answer may be as to whether civil discrimination against homosexuals is unconstitutional, there can be only one answer as to whether civil discrimination against heterosexuals is unconstitutional. Even under the standard of minimal scrutiny, the rational basis test, such discrimination could not pass muster: it is totally irrational.

It should also be recalled that sexual orientation, as contrasted with sexual acts, has never been made a crime by any legislature. Indeed, if sexual orientation is a status, no legislature could constitutionally make it a crime. Robinson v. California, 370 U.S. 660 (1962). The instant case is about sexual orientation, not about sexual acts.

(3)

ADDITIONAL REASON FOR GRANTING THE WRIT

In the courts below, counsel for New York Medical College made strenuous efforts to refute petitioner's claim that their client was a State actor in the matter at bar, by citing several decisions by trial courts in the New York metropolitan area, none of them reported, which had rejected similar claims in regard to personnel discharged at other municipal hospitals being operated either by their client or by others under similar affiliation contracts with HHC. Appeals had not been taken from the decisions they cited. None of them gave any serious attention to the Equal Protection Clause of the Fourteenth Amendment, or even so much as mentioned Burton, Perry, or the anti-discrimination clause in § 5.07 of the affiliation agreements. If this array of unreproted precedent means what counsel for the Medical College are citing it for, one

discerns a growing disregard by trial courts in the New York area of this Court's teaching in Burton v. Wilmington Parking Authority and Perry v. Sindermann.

A halt should be called. Though the plaintiffs in these other unreported cases did not appeal, Dr. Konarski has appealed in the case at bar, thus giving New York's appellate courts the opportunity to correct this pernicious trend. They did not do so. In consequence, this Court is the only forum left which can.

If this Court is as persuaded of the merits of petitioner's claim as the foregoing arguments would appear to warrant, it need not devote a full opinion, or time for oral arguments, to the case at bar. A simple grant of the writ, reversal and remand for reconsideration in the light of Burton v. Wilmington Parking Authority and Perry v. Sindermann should suffice.

THE RAISING IN THE COURTS BELOW OF THE
FEDERAL CONSTITUTIONAL CLAIMS

Equal Protection: State Action

In Petitioner's Pre-Argument Statement filed in the Appellate Division, First Department, dated November 4, 1985, paragraph (9), the following appears:

Nature and Object of the Cause of
Action

Damages for wrongful discharge from employment, in violation of Plaintiff-Appellant's rights under the Equal Protection Clause (U.S. Const. Amdt. XIV, § 1; N.Y. State Const. art. 1, § 11) (heterosexual doctor forced out by clique of homosexual physicians).

Plaintiff-Appellant expressly relied upon the "equal protection clause" in his Memorandum in Opposition to the Motion to Dismiss the Complaint and for Summary Judgment (sworn to May 11, 1985), paragraph 3 (p. 2, line 6), in the court below.

(R. 3, 126)

In Plaintiff's Brief in the Appellate Division (pp. 7-8), and in Defendants' Brief (pp. 30-36, and Appendix), as well as in Plaintiff's Reply Brief (pp. 1-3), the State Action issue was debated.

In the Briefs in the Court of Appeals (on the motion for leave to appeal to that court), Plaintiff discussed the State Action issue at pp. 8-10, Defendants at pp. 6-10.

Due Process

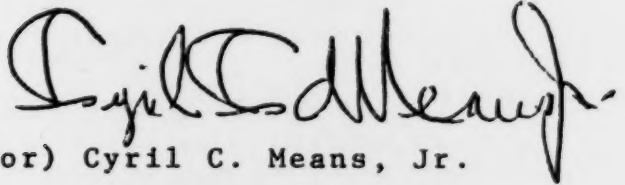
This matter was discussed at the deposition of plaintiff, taken at defendants' request, between defendants' counsel and plaintiff, in connection with the latter's assertion that he was entitled to a hearing before being discharged (R. 662-63).

It was also referred to in Defendants' papers in support of their motion for summary judgment in the trial court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Cyril C. Means, Jr.", written in a cursive style.

(Professor) Cyril C. Means, Jr.

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December 3, 1987.

APPENDIX



MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM, PART I

STANISLAW KONARSKI, M.D.,
Plaintiff,

against

NEW YORK MEDICAL COLLEGE,
KARL P. ADLER, M.D.,
PHILIP HENIG, M.D., and
KURT ALTMAN, M.D.,

Defendants.

) FILED

) OCT 7 1985

) Index Number
) 42606/84

) Calendar Number
) 194 of May 31,
) 1985

MEMO

WOLIN, Eugene R., J:

Plaintiff Stanislaw Konarski, M.D., has brought this action claiming that he was wrongfully discharged from his employment because he is an avowed heterosexual. The defendants now move for summary judgment dismissing the complaint.

Plaintiff commenced employment with the New York City Health and Hospitals Corporation (HHC) in February, 1958, and was assigned to

Metropolitan Hospital. Plaintiff's employment was on a part-time basis and he worked 17½ hours per week in the General Internal Medicine Ambulatory Care Center (Ambulatory Care Center) at the hospital. In 1968 pursuant to an affiliation agreement operation of the hospital was transferred to the defendant New York Medical College (College). As a result, Doctor Konarski became an employee of the College. His part-time employment at Metropolitan Hospital in the Ambulatory Care Center continued until July 1, 1981. In May of that year defendant Karl P. Adler, M.D., the Chief of medicine at Metropolitan Hospital decided upon a reorganization of the Ambulatory Care Center. The emphasis in the reorganization was the assignment of individual patients to particular physicians on a continuing basis. To implement this program a staff of full-time physicians was required. The part-time physicians, such as plaintiff,

could elect either to work full-time or to leave the employ of the hospital. In addition plaintiff concedes that he was offered a comparable part-time position in another department of the hospital. Plaintiff rejected this offer. Plaintiff's employment was then terminated on July 1, 1981. On or about July 1, 1982, plaintiff filed an age discrimination charge against the College with the Equal Employment Opportunity Commission (the Commission). The College responded to this charge and by letter dated November 30, 1982, the Commission informed the College that it was discontinuing processing plaintiff's charge. In June, 1984, plaintiff commenced this action alleging discrimination based upon his sexual preference; fraudulent representations by the College in proceedings before the Commission; fraudulent concealment of the reasons for his termination and breach of contract.

The complaint may be dismissed on several grounds:

First, New York does not recognize a cause of action for wrongful termination of employment in the absence of a written contract of employment (Murphy v. American Home Products, 58 NY2d 293). Plaintiff has produced no written contract but instead seeks to rely upon alleged oral assurances that his employment would be permanent. The rule is clear that where there is no fixed period of employment, the employment is terminable at will by the employer for any reason or for no reason (Murphy v. American Home Products, 58 NY2d 293, supra; Mackie v. La Salle Industries, 92 AD2d 821; Pavolini v. Bard Air Corp., 88 AD2d 714). Plaintiff's reliance upon the affiliation agreements between HHC and the College is misplaced. Nothing in those agreements relates to the terms and conditions of his employment. Nor has plaintiff established reliance upon any other documents or employee manuals (Weiner v. McGraw-Hill, 57 NY2d 458).

Second, at this point in time New York does not recognize a cause of action for discrimination based upon sexual preference (Under 21, Catholic Home Bureau for Dependent Children v. The City of New York, __ NY2d __, NYLJ, July 5, 1985, P. 17, Col. 1; Rich v. Secretary of the Army, 735 F.2d 1220; De Santis v. Pacific Tel. and Tel., 608 F2d 327). While plaintiff's private sexual practices enjoy a measure of protection from government regulation (People of the State of New York v. Onofre, 51 NY2d 476), that protection has not been extended to eliminate discrimination in the employment practices of private industry.

Third, even if such a cause of action existed plaintiff has not established any basis for his claim of discrimination. In essence plaintiff claims that his position at the hospital was undermined by, and his employment subsequently terminated by a "homosexual clique." Plaintiff offers no

admissible evidence as to the sexual orientation of the individual defendants, relying instead upon his own feelings and inferences. One colleague on the staff of the hospital is thought to be homosexual because he has frequently been heard to complain about his wife. Even assuming that conclusive proof on the question may be difficult to obtain the court should not construe pleadings so liberally as to allow stuff and nonsense to state a cause of action. Nor should the court permit discovery which would be both purposeless and an unwarranted intrusion upon individual privacy.

Fourth, plaintiff has not established any reliance upon the representations made by the College at the proceedings before the Commission. In his deposition plaintiff has stated that he never believed the reasons proffered by the College. Without proof of reliance plaintiff cannot succeed on any claim of fraudulent misrepresenta-

tion or fraudulent concealment (JoAnn Homes at Bellemore v. Dworetz, 25 NY2d 112; Channel Master Corp. v. Aluminium Ltd. Sales, 4 NY2d 403)).

Fifth, as to any breach of contract plaintiff has failed to establish any agreement by defendants to pay him at any fixed rate. Plaintiff was an employee at will and there is no duty on his employer to deal with him fairly or in good faith (Murphy v. American Home Products, 58 NY2d 293). Thus the mere fact that other physicians in part-time positions may have been paid at a higher rate does not, without more, establish a cause of action for breach of contract.

Finally, even if the allegations were proven the individual defendants would not be liable to plaintiff for interference with his contract of employment (Mackie v. La Salle Industries, 92 AD2d 821, supra; Manley v. Pandick Press, 72 AD2d 452, app dsmd, 49 NY2d 981; Greyhound Corp. v.

Commercial Cas. Ins. Co., 259 App Div 317). Plaintiff may have had an action for defamation against the individual defendants (Milone v. Jacobson, 78 AD2d 548). However, this cause of action must be commenced within one year and would have been time-barred when the present complaint was served.

In the light of the foregoing the motion of the defendants must be granted.

Accordingly, the motion of the defendants for summary judgment dismissing the complaint is granted with costs and disbursements.

Settle order.

October 4, 1985.

(s) E.R.W.
J.S.C.

Order appealed from

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York at the Supreme Courthouse, 60 Centre Street, New York, New York, on the 19th day of November, 1985.

P R E S E N T :

Hon. EUGENE R. WOLIN
Justice

| | | |
|---------------------------|---|--------------------|
| STANISLAW KONARSKI, M.D., |) | |
| |) | |
| Plaintiff, |) | Index No. 42606/84 |
| |) | |
| against |) | |
| |) | <u>ORDER</u> |
| NEW YORK MEDICAL COLLEGE, |) | |
| KARL P. ADLER, M.D., |) | |
| PHILIP HENIG, M.D., and |) | |
| KURT ALTMAN, M.D., |) | |
| |) | |
| Defendants. |) | |

Defendants New York Medical College, Karl P. Adler, M.D., Philip Henig, M.D., and Kurt Altman, M.D., having moved this Court by notice of motion pursuant to CPLR R3211 and R3212, for an order granting defendants summary judgment dismissing the complaint herein, and defendants' motion having duly

come on to be heard on May 31, 1985, and plaintiff having appeared by his attorney, Ronald J. L. Jackson, Esq., in opposition to defendants' motion, and defendants having appeared by its attorneys, Kelley Drye & Warren by Richard S. Order, in support of defendants' motion, and due deliberation having been had, and the Court having rendered its decision in writing dated October 4, 1985,

NOW upon reading and filing the notice of motion dated March 22, 1985 with proof of service thereof, the affirmation of Richard S. Order dated March 22, 1985 with exhibits attached thereto, the affidavit of Karl P. Adler, M.D., sworn to on March 21, 1985 with exhibits attached thereto, the affidavit of Philip Henig, M.D., sworn to on March 21, 1985, the affidavit of Kurt Altman, M.D., sworn to on March 21, 1985, the transcript of the deposition of plaintiff taken September 21, 1984 and October

19, 1984 as filed with the Clerk of the Court, the affidavit of Stanislaw Konarski, M.D., sworn to May 11, 1985 in opposition to the motion, the affirmation of Ronald J. L. Jackson dated May 14, 1985 with exhibits attached thereto, in opposition to the motion, the reply affirmation of Richard S. Order dated May 30, 1985 with exhibits attached thereto, the reply affidavit of Karl P. Adler, M.D., sworn to May 30, 1985, the reply affidavit of Marc Weinberger sworn to on May 30, 1985 with exhibit attached thereto, and all the other papers filed heretofore, it is

ORDERED that defendants' motion for an order pursuant to CPLR R3211 and R3212 for summary judgment dismissing the complaint herein is granted with costs and disbursements, and it is further

12a

ORDERED that plaintiff's complaint is
dismissed and the Clerk is directed to
enter judgment accordingly.

E N T E R :

(s) E.R.W.

J.S.C.

FILED

NOV 26 1985

COUNTY CLERK'S OFFICE
NEW YORK

Order of affirmance, without opinion, by the
Appellate Division, First Department

At a term of the Appellate Division
of the Supreme Court held in and for
the First Judicial Department in the
County of New York, on April 7, 1987

Present--

Hon. Theodore R. Kupferman,
Justice Presiding,
Hon. Joseph P. Sullivan,
Hon. John Carro,
Hon. Betty Weinberg Ellerin,
Hon. George Bundy Smith,
Justices.

Stanislaw Konarski, M.D.,

Plaintiff-Appellant,

against

New York Medical College,

Karl P. Adler, M.D.,

Philip Henig, M.D., and

Kurt Altman, M.D.,

Defendants-Respondents.

29667

An appeal having been taken to this Court
by the plaintiff-appellant from an order of
the Supreme Court, New York County (Eugene
Wolin, J.), entered on November 26, 1985,
and said appeal having been argued by

William J. Dowling, Jr., of counsel for the appellant, and by Sarah L. Reid and Sandra K. Rotter, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Order by the Appellate Division, First Department, denying motion for leave to appeal to the Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 9, 1987

Present--

Hon. Theodore R. Kupferman,
Justice Presiding,
Hon. Joseph P. Sullivan,
Hon. John Carro,
Hon. Betty Weinberg Ellerin,
Hon. George Bundy Smith,
Justices.

| | | |
|---------------------------|---|---------|
| Stanislaw Konarski, M.D., |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | M-2012 |
| against |) | (29667) |
| |) | |
| New York Medical College, |) | |
| Karl P. Adler, M.D., |) | |
| Philip Henig, M.D., and |) | |
| Kurt Altman, M.D., |) | |
| |) | |
| Defendants-Appellants. |) | |

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on April 7, 1987,

Now, upon reading and filing the papers

16a

with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied, with \$20 costs.

ENTER:

HAROLD J. REYNOLDS
Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at
Court of Appeals Hall in the City of
Albany on the fifteenth day of
September, A.D. 1987,

PRESENT,

HON. SOL WACHTLER, Chief Judge,
presiding.

| | | |
|---------------------------------|--------------|---|
| 1-10 | Mo. No. 783 |) |
| | |) |
| Stanislaw Konarski, M.D., | |) |
| Appellant, | |) |
| vs. | |) |
| | |) |
| New York Medical College, Inc., | |) |
| et al., | |) |
| | Respondents. |) |

A motion for leave to appeal to the
Court of Appeals in the above cause having
been heretofore made upon the part of the
appellant herein and papers having been
submitted thereon and due deliberation
thereupon had, it is

18a

ORDERED, that the said motion be
and the same hereby is denied with twenty
dollars costs and necessary reproduction
disbursements.

(s) Stuart M. Cohen

Stuart M. Cohen
Deputy Clerk of the Court

**McKINNEY'S
CONSOLIDATED LAWS
OF
NEW YORK
ANNOTATED**

**Book 65
Unconsolidated Laws
§§ 6401 to 8580**

With Annotations
**From
State and Federal Courts
and
State Agencies**

(1979)

**ST. PAUL, MINN.
WEST PUBLISHING CO.**

CHAPTER 5—NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Sec.

- 7381. Short title.
- 7382. Declaration of policy and statement of purposes.
- 7383. Definitions.
- 7384. New York city health and hospitals corporation.
- 7384-a. Corporation as a political subdivision.¹
- 7385. General powers of the corporation.
- 7386. Relationship to the city; agreements concerning health facilities.
- 7387. Conveyance of property by the city to the corporation; acquisition of property by the city.
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- 7389. Contracts.
- 7390. Personnel administration; collective bargaining; pension and retirement benefits; article fourteen civil service law; paragraph ² two hundred twenty labor law; personnel review board.
- 7391. Officers and employees not to be interested in transactions.
- 7392. Moneys of the corporation.
- 7393. Issuance of bonds and notes by the corporation.
- 7394. Reserve fund.
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- 7396. State and city not liable on bonds and notes.
- 7397. City's right to require redemption of bonds.
- 7398. Remedies of holders of bonds and notes.
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- 7401. Actions by and against the corporation.
- 7402. Bonds and notes as legal investments.
- 7403. Annual and special reports.
- 7404. Act not affected if in part unconstitutional or ineffective.
- 7405. Inconsistent provisions of other laws superseded.
- 7406. Termination of the corporation.

¹ Section enacted without catchline which has been supplied by editor.

² So in original. Probably should be "section".

Library References

Hospitals § 2 et seq.
Mechanics' Liens § 1, 20.

C.J.S. Hospitals § 4.
C.J.S. Mechanics' Liens §§ 1 et seq.,
17.

§ 7381. Short title

This act¹ may be cited as the "New York city health and hospitals corporation act".

L.1969, c. 1016, § 1 [§ 1].

¹ Sections 7381 to 7400.

§ 7382. Declaration of policy and statement of purposes

It is hereby found, declared and determined that the provision and delivery of comprehensive care and treatment of the ill and infirm, both physical and mental, are of vital and paramount concern and essential to the protection and promotion of the health, safety and welfare of the inhabitants of the state of New York and the city of New York.

There are serious shortages in the number of personnel adequately trained and qualified to provide the quality care and treatment needed. A myriad of complex and often deleterious constraints and restrictions place a harmful burden on the delivery of such care and treatment. Technological advances have been such that portions of the health and medical services now delivered by the city are not as advanced as they should be. A system permitting legal, financial and managerial flexibility is required for the provision and delivery of high quality, dignified and comprehensive care and treatment for the ill and infirm, particularly to those who can least afford such services.

It is further found, declared and determined that hospitals and other health facilities of the city are of vital and paramount concern and essential in providing comprehensive care and treatment for the ill and infirm, both physical and mental, and are thus vital to the protection and the promotion of the health, welfare and safety of the people of the state of New York and the city of New York.

There are inadequate general and specialized health care facilities including but not limited to nursing homes and related laboratories and ambulatory care clinics and centers and diagnostic treatment centers. The inadequacy and shortage of health facilities derives from such factors among others as the rapid technological changes and advances taking place in the medical field. These changes and advances have created the need for substantial structural and functional changes in existing facilities. Many of the health facilities of the city are overcrowded. Buildings are deteriorating and many suffer harm as a result of piecemeal and uncoordinated additions. The facilities available for education,

§ 7382**UNCONSOLIDATED LAWS****Title 18**

research and development are inadequate to meet the demands of the medical field. Procedures inherent in the administration of health and medical services as heretofore established obstruct and impair efficient operation of health and medical resources.

It is found, declared and determined that in order to accomplish the purposes herein recited, to provide the needed health and medical services and health facilities, a public benefit corporation, to be known as the New York City health and hospital corporation, should be created to provide such health and medical services and health facilities and to otherwise carry out such purposes; that the creation and operation of the New York city health and hospitals corporation, as hereinafter provided, is in all respects for the benefit of the people of the state of New York and of the city of New York, and is a state, city and public purpose; and that the exercise by such corporation of the functions, powers and duties as hereinafter provided constitutes the performance of an essential public and governmental function.

L.1969, c. 1016, § 1 [§ 2].

§ 7383. Definitions

As used or referred to in this act,¹ unless a different meaning clearly appears from the text:

1. "Administrator" or "Health service administrator" shall mean the administrator of health services of the city of New York.

2. "Administration" shall mean the health services administration of the city of New York.

3. "Board" shall mean the board of directors of the corporation as such board is constituted pursuant to section four of this act.²

4. "Bonds" and "notes" shall mean bonds and notes respectively, authorized and issued by the corporation pursuant to this act.¹

5. "City" shall mean the city of New York.

6. "Comptroller" shall mean the comptroller of the city of New York.

7. "Construction" shall mean site acquisition, planning, design, erection, building, alteration, reconstruction, renovation, improvement, extension, enlargement, replacement or modification and the inspection or modification thereof.

§ 7383**UNCONSOLIDATED LAWS****Title 18**

terms for years and liens thereon by way of judgments, mortgages, or otherwise.

16. "Reimbursement allowance" shall mean any money paid by any government, or any agency or subdivision thereof or by a social services district or by any private institution or organization or person including, but not limited to, payments authorized by and made pursuant to the federal social security act ⁴ and the state social services law, to the corporation for the costs of health and medical services furnished to beneficiaries thereof provided by the corporation directly or through agreement with the city.

17. "State" shall mean the state of New York.

18. "Subsidiary corporation" shall mean a corporation created pursuant to subdivision twenty of section five of this act.⁵

19. "Non-profit hospital" shall mean an organization authorized by law to provide health and medical services, organized exclusively for charitable purposes on a non-profit basis, which does not devote more than an insubstantial part of its total activities to activities not in furtherance of its charitable purposes, does not participate or intervene (including publishing or distributing statements), directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office, and no substantial part of the activities of which is devoted to attempting to influence legislation by propaganda or otherwise and no part of the net earnings of which inures to the benefit of a private shareholder or individual.

L.1969, c. 1016, § 1 [§ 3]; amended L.1976, c. 724, § 14.

¹ Sections 7381 to 7406.

² Section 7384.

³ Pub.L. 89-749, Nov. 3, 1966, 80 Stat. 1180. For classification, see U.S.C.A. Tables volume.

⁴ 42 U.S.C.A. 301 et seq.

⁵ Section 7385.

Historical Note

1976 Amendment. Subd. 11. L. management and budget" for "director of the budget".
1976, c. 724, § 14 eff. July 24, 1976, substituted references to "director of


§ 7384. New York city health and hospitals corporation

1. A corporation, to be known as the "New York city health and hospitals corporation," is hereby created. Such corporation shall be a body corporate and politic constituting a public benefit corporation. It shall be administered by a board of directors consisting of sixteen members, constituted as follows: five di-

§ 7384-a UNCONSOLIDATED LAWS

Title 18

§ 7384-a. Corporation as a political subdivision¹

For the purposes of sections one hundred seventy-five (a)² and one hundred seventy-five (b)³ of the state finance law, the corporation shall be deemed to be a political subdivision.

L.1969, c. 1016, § 1 [§ 4-a], added L.1970, c. 58.

¹ Section enacted without catchline which has been supplied by editor.


² So in original. Probably should be "one hundred seventy-five a".

³ So in original. Probably should be "one hundred seventy-five-b".

§ 7385. General powers of the corporation

The corporation shall have the following powers in addition to those specifically conferred elsewhere in this act:¹

1. To sue and be sued;
2. To have a seal and to alter the same at its pleasure;
3. To adopt, alter, amend or repeal by-laws or rules or regulations for the organization, management, and regulation of its affairs;
4. To borrow money and to issue negotiable notes, bonds or other evidences of indebtedness and to provide for the rights of the holders thereof in accordance with the provisions of this act;¹ provided, however, that the corporation shall not issue bonds, notes or other evidences of indebtedness for the construction of a health facility without the prior approval of the mayor and, in the case of major construction, without first submitting to the mayor a written statement of the chairman of the board stating that the corporation has consulted with the New York State housing finance agency and the New York State health and mental hygiene facilities improvement corporation² with respect to such major construction.
5. To make and to execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes;
6. To acquire, by purchase, gift, devise, lease or sublease, and to accept jurisdiction over and to hold and own, and dispose of by sale, lease or sublease, real or personal property, including but not limited to a health facility, or any interest therein for its corporate purposes; provided, however, that no health facility or other real property acquired or constructed by the corporation shall be sold, leased or otherwise transferred by the corporation without public hearing by the corporation after twenty days public notice and without the consent of the board of estimate of the city;



7. To operate, manage, superintend, and control any health facility under its jurisdiction and to repair, maintain and otherwise keep up any such health facility; and to establish and collect fees, rentals or other charges, including reimbursement allowances, for the sale, lease or sublease of any such health facility, subject to the terms and conditions of any contract, lease, sublease or other agreement with the city;

8. To provide health and medical services for the public directly or by agreement or lease with any person, firm or private or public corporation or association, through and in the health facilities of the corporation and to make rules and regulations governing admissions and health and medical services; and to establish and collect fees and other charges, including reimbursement allowances, for the provision of such health and medical services; and to provide and maintain continuous resident physician and intern medical services; and to sponsor and conduct research, educational and training programs;

9. To provide, maintain and operate an ambulance service to bring patients to or remove them from any health facility of the corporation, and to adopt a schedule of appropriate charges and to provide for the collection thereof;

10. To determine, in accordance with standards established by the administration, the conditions under which a physician may be extended the privilege of practicing within a health facility under the jurisdiction of the corporation, and to promulgate reasonable rules and regulations for the conduct of all persons, physicians and nurses within any such facility;

11. To employ officers, executives, management personnel, and such other employees who formulate or participate in the formulation of the plans, policies, aims, standards, or who administer, manage or operate the corporation and its hospitals or health facilities, or who assist and act in a confidential capacity to persons who are responsible for the formulation, determination and effectuation of management policies concerning personnel or labor relations, or who determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment.

All such personnel shall be excluded from collective bargaining representation.

12. To employ such other employees as may be necessary and except as otherwise provided herein to promulgate rules and regulations relating to the creation of classes of positions, po-

§ 7385**UNCONSOLIDATED LAWS****Title 18**

subsidiary corporation subject to the provisions of this act¹ and to any agreement entered into pursuant thereto; provided, however, that each such subsidiary corporation shall be subject to any restrictions, approvals, and limitations to which the corporation may be subject;

21. To do any and all things necessary, convenient or desirable to carry out its corporate purposes, and for the exercise of the powers given to it in this act.¹

L.1969, c. 1016, § 1 [§ 5]; amended L.1969, c. 1017.

¹ Sections 7381 to 7406.

² Now the Facilities Development Corporation, see section 4404.

³ Now known as the Facilities Development Corporation Act, see sections 4401 to 4417.

⁴ May 26, 1969.

⁵ Section 7401.

Historical Note

1969 Amendment. Subd. 20, par. (a). L.1969, c. 1017, eff. May 26, 1969, in sentence beginning "The board of" inserted "except in the case of the Harlem Hospital Center or the new Harlem Hospital Center".

§ 7386. Relationship to the city; agreements concerning health facilities

1. (a) The city shall on or before the first day of July nineteen hundred seventy enter into an agreement or agreements with the corporation, pursuant to this section and section seven¹ herein, whereby the corporation shall operate the hospitals then being operated by the city for the treatment of acute and chronic diseases, and for the fiscal year of the city commencing on the first day of July nineteen hundred seventy and thereafter the city shall include in its expense budget an appropriation of tax levy for the services provided by the corporation and pay the corporation an amount which shall not be less than one hundred seventy-five million dollars; provided, however, that for the fiscal year beginning July first, nineteen hundred seventy-two and thereafter the amount shall be adjusted annually to take account of increases in the cost of health care as reflected in increases in the average rates of reimbursement set by the state pursuant to section twenty-one hundred seven of the public health law² for health and hospital services in New York City, and changes in the volume of services rendered by the corporation and required by the city for which no reimbursement from third-party sources is available. The corporation shall submit a program budget to the city, in time for inclusion in the mayor's executive

budget, detailing the anticipated expenditure of the tax levy funds appropriated by the city for the coming fiscal year.

The provisions of subdivision three of paragraph a of section 135.00 of the local finance law shall not apply to a contract entered into pursuant to this section.

1. (b) ³ Within a reasonable time thereafter the city shall enter into a similar agreement or agreements for the remaining personal health and medical facilities then operated by the city.

2. (a) The corporation shall have the power to enter into contracts, leases, sub-leases or other agreements permitting the city to purchase, lease, sub-lease or otherwise acquire or use any health facility by or under the jurisdiction of the corporation; and to permit the city to construct or add health facilities or improvements upon or to such health facility.

(b) The city shall be empowered to purchase, lease, sub-lease or otherwise acquire or contract for the use of and use any health facility held by or under the jurisdiction of the corporation, or to construct or add health facilities or improvements upon or to such a health facility, in accordance with the terms of any contract, lease, sub-lease or other agreement entered into pursuant to the terms of this act.⁴

3. Any contract, lease, sub-lease or other agreement between the city and the corporation for the purchase, lease, sub-lease, use, operation or construction and equipment of a health facility, as authorized by this act,⁴ shall

(a) set forth any health facility to be constructed and equipped, used or operated;

(b) provide that the corporation shall apply for and receive all reimbursement allowances or other moneys available to the corporation from any source for the provision of health and medical services for which such reimbursement allowances or other moneys are available, through or in the facilities of the corporation, and that such reimbursement allowances or other moneys shall be collected and received by the corporation directly from any such source, and used by the corporation for the purposes herein recited;

(c) provide that whenever the city requires the corporation to provide health and medical services to persons in the city, the city shall pay the corporation for the cost of such services as are actually rendered, such cost to be determined by agreement between the city and the corporation; provided, however, that such payments shall only be made by the city to the extent that no re-

87-1127

No. 87-

Supreme Court, U.S.

FILED

FEB 5 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

— against —

NEW YORK MEDICAL COLLEGE, INC.,
KARL P. ADLER, M.D., PHILIP HENIG, M.D.,
and KURT ALTMAN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

SARAH L. REID
Counsel of Record for
Respondents
101 Park Avenue
New York, New York
10178
(212) 808-7800

Of Counsel:

KELLEY DRYE & WARREN
RICHARD J. CONCANNON
SANDRA K. ROTTER



QUESTIONS PRESENTED

Should this Court in the exercise of its discretion grant review on a writ of certiorari where: (i) there are no special or important reasons therefor as required by Rule 17; (ii) Petitioner presented his case below as essentially one for breach of an employment contract, fraud and violation of state constitutional law and did not even brief a Fourteenth Amendment claim until appeal; and (iii) the New York State courts below properly rejected any Fourteenth Amendment claim since (a) the Respondent New York Medical College, a private not-for-profit corporation, is not a state actor under settled law and (b) in any case, Respondents' decision to eliminate all part-time employment in its ambulatory care center in favor of full-time commitments was a rational means of achieving the legitimate purpose of reorganization in order to improve medical services?



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Constitutional Provisions

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| United States Constitution, Fourteenth Amendment | <i>passim</i> |
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

— against —

NEW YORK MEDICAL COLLEGE, INC.,
KARL P. ADLER, M.D., PHILIP HENIG, M.D.,
and KURT ALTMAN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents New York Medical College, Karl P. Adler, M.D., Philip Henig, M.D., and Kurt Altman, M.D. respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the New York Supreme Court, Appellate Division, First Department affirming dismissal of the complaint and summary judgment against Petitioner Stanislaw Konarski, M.D.

OPINIONS BELOW

The opinion of the New York Supreme Court Appellate Division, First Department (Petition at 13a-14a) is reported at 129 A.D.2d 1018 (1st Dep't 1987). Denial of leave to appeal that decision to the New York Court of Appeals was issued in an unreported decision by the Appellate Division on June 9, 1987 (Petition at 15a-16a), and by the New York Court of Appeals at 70 N.Y. 2d 606 (1987). The decision of the trial court, New York Supreme Court, New York County, Special Term, Part 1, entered on October 7, 1985, is unreported (Petition at 1a-12a).

JURISDICTION

The order denying leave to appeal to the Court of Appeals was entered on September 15, 1987 by that Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The Petition for Certiorari arises out of the termination of the part-time at-will employment at Metropolitan Hospital Center ("Metropolitan Hospital") of Stanislaw Konarski, M.D. ("Petitioner") by Respondent New York Medical College ("Medical College") pursuant to a reorganization program in July 1981 (R. 9-10, 57-58).¹ At various times thereafter, Petitioner has labeled such termination as age discrimination (a charge rejected by the Equal Employment Opportunity Commission)², a breach of contract although he concedes he has no written contract, fraud, and an amorphous claim that the individual Respondents herein, his colleagues and superiors, were members of a "homosexual clique"

¹ Numbers in parentheses preceded by the letter "R" are page references to the Record on Appeal, available from Respondents if requested by the Court.

² On July 1, 1982, Petitioner filed with the Equal Employment Opportunity Commission ("EEOC") a charge of discrimination solely on the basis of age concerning the termination of his part-time employment by the Medical College at Metropolitan Hospital (R. 10, 114-15). By letter dated November 30, 1982, the EEOC discontinued processing the charge (R. 10, 118).

which caused his discharge because he was heterosexual.³ Petitioner primarily relied on the New York State discrimination laws to support that claim below.

Respondents' position has been, and the courts so found, that Petitioner's termination was prompted by the development of a new program in health care designed for the working poor at Metropolitan Hospital, which obligated Respondents to recruit full time physicians rather than part time physicians into the Hospital's General Internal Medicine Ambulatory Care Center (R. 9-10, 50, 51, 53). The termination of Petitioner occurred simultaneously with the termination of a number of other physicians, all of whom were part time (R. 10, 116). Out of consideration to Petitioner, Respondent Philip Henig, M.D. ("Dr. Henig") the Director of Ambulatory Care, offered Petitioner a comparable position in the Hospital's Medical Screening Clinic, which Petitioner rejected, (R. 10, 51-52). Petitioner also rejected the offer to work full-time in the Ambulatory Care Center (R. 10, 65, 111).

In June 1984, a year and a half after the EEOC discontinued its processing of his charge, Petitioner filed this suit in the Supreme Court, New York County. (The verified complaint is set forth at R. 32-45.) The complaint, as amplified by the briefing on the motion to dismiss and for summary judgment, contained claims for interference with employment, fraud, breach of an unspecified contract and an implied covenant of fair dealing, and discrimination pursuant to an unnamed statute. The alleged discrimination was based on Petitioner's claim that his part-time, at-will employment was terminated because Respondents Kurt Altman, M.D. ("Dr. Altman") and Dr. Henig were homosexuals who retaliated against him because he was heterosexual, by persuading Karl P. Adler, M.D. ("Dr. Adler") to terminate Petitioner's employment because of complaints Petitioner had made to them concerning

³ At his deposition Petitioner's proof that the individual Respondents were homosexual consisted of statements such as "[b]ecause of his attitude, behavior, hostilities . . . he spoke in a hostile way about his wife to everybody" (R. 498-99). The trial court properly characterized such allegations as "stuff and nonsense" (Petition at 6a).

favorable treatment accorded a fellow employee-physician on the basis of his (homo)sexual preference.

Respondents answered the complaint and denied each of Petitioner's claims, asserting in part that:

- the Medical College is a private, not-for-profit corporation that is affiliated through the New York City Health and Hospitals Corporation ("NYCHHC") with Metropolitan Hospital (R. 47).
- the Medical College makes all decisions relating to the terms and conditions of employment of physicians employed at Metropolitan Hospital (R. 48).
- Petitioner became a part-time employee of the Medical College at Metropolitan Hospital pursuant to the affiliation agreement with the New York City Health and Hospitals Corporation ("NYCHHC") in 1968 (R. 49).
- the employment agreement between the Medical College and Petitioner was terminable at the will of either party without notice (R. 57).

At the conclusion of Petitioner's examination before trial, in view of the admissions made by Petitioner which demonstrated that he had no cause of action, Respondents moved to dismiss the complaint and for summary judgment.*

The trial court granted the motion, and in response to the briefing by the parties cited several grounds in its decision. (The trial court's decision is annexed to the Petition at 1a-8a.) First, the court ruled that there could have been no breach of contract by Respondents because Petitioner had no written agreement with

* The New York City Health and Hospitals Corporation, Metropolitan Hospital Center and Richard D. Levere, M.D. had already been dismissed from this action by orders of the New York Supreme Court entered September 20 and 27, 1984. No appeal was taken from either order.

the Medical College as to the terms of his employment and was therefore an employee at-will (Petition at 4a). Second, the court held that a cause of action for discrimination based on sexual preference does not exist in New York (Petition at 5a). Third, the court found that even if such a cause of action did exist, Petitioner had utterly failed to establish a factual basis for his claim of discrimination against him because he was heterosexual and the court refused to "construe pleadings so liberally as to allow stuff and nonsense to state a cause of action" (Petition at 5a-6a).

Fourth, the court found that a claim of fraud against the Medical College with respect to Petitioner's termination could not lie because Petitioner's deposition admissions revealed that the element of reliance, necessary in an action for fraud, was completely missing (Petition at 6a-7a). Fifth, the court ruled that Respondents had no duty as a matter of law to deal with Petitioner, an employee at-will, fairly or in good faith so that his part-time salary was at all times the equivalent of his fellow physicians (Petition at 7a). Finally, the court held that even if allegations against the individual Respondents were proven, no action could lie against them for interference with Petitioner's employment (Petition at 7a-8a).

Petitioner appealed the decision of the trial court to the Appellate Division of the Supreme Court, First Department, where, for the first time, he briefed a Fourteenth Amendment claim. That court affirmed, without opinion, the order of the trial court. (The order of the Appellate Division is annexed to the Petition at 13a-14a.) Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals of New York, and the motion was denied with costs. (The order of the Appellate Division is annexed to the Petition at 15a-16a.) Petitioner then moved in the Court of Appeals for leave to appeal in that Court, and that motion, too, was denied with costs. (The order of the Court of Appeals is annexed to the Petition at 17a-18a.) Petitioner then filed the present Petition requesting that this Court review the decisions below.

REASONS FOR DENYING CERTIORARI

I

The present case lacks any issue which warrants review by this Court. At core, the action presents a contractual issue, namely whether a private employer has the right to determine the staff allocations of its full and part-time at-will employees. Petitioner's belated attempts to imbue this issue with constitutional dimensions in order to seek access to this Court should be dismissed.

Respondents have now spent almost six years answering Petitioner's various charges. At each level, those charges have been rejected, and thereafter Petitioner's theories have changed — often as his counsel changed.⁵ The present Petition now takes those same allegations, adopts a wildly expansive interpretation of the Fourteenth Amendment, and for the first time relies on a provision of the affiliation agreement between the Medical College and the NYCHHC which was never mentioned below. The Petition reflects but the latest transformation of a case which has proven to be a veritable chameleon in making its way through the courts.

To the extent that Petitioner's claims are now based on his interpretation of §5.07 of the affiliation agreement, those claims are improperly asserted. While the lengthy agreement was submitted into the record by Respondents at the trial level (R. 226-357), no claim was focused on any specific provision therein, and it is unrealistic to assume that any one provision was considered by the courts below. The provision should not now be considered. *Butterworth v. Bowen*, 796 F.2d 1379, 1387 (11th Cir. 1986). Similarly Petitioner's reliance now on provisions of the N.Y. Unconsolidated Laws should be rejected since those provisions were also not briefed below.

Finally, Petitioner has utterly failed to make any showing that special or important reasons are presented on this record which

⁵ Petitioner has been represented by three different counsel at various times in this action.

would justify review by this Court. The decisions of the New York State courts are in complete accord with the well-settled law of that State. No federal constitutional issues need be considered to supplement those decisions. Review by this Court would be futile since, even if this Court were to rule on Petitioner's state action claim, it is clear the substance of Petitioner's unusual Fourteenth Amendment claim must fall. The interests of justice require an end to this action which has bordered on the frivolous since its inception.

II

Petitioner contends that the state courts below improperly found that the Medical College, a private not-for-profit institution, is not a state actor for Fourteenth Amendment purposes, and that the courts failed to properly apply the *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), "symbiotic relationship" standard. Significantly, Petitioner does not contend that the challenged activity meets either the "nexus" or "public function" test put forth in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and apparently concedes that under these tests, the termination of his employment cannot be deemed state action.⁶

In order to meet the "nexus" test, there must be "a sufficiently close nexus between the [NYCHHC] and the challenged action of the [Medical College] so that the action of the latter may be fairly treated as that of the State itself." *Jackson, supra* 419 U.S. at 351 (1974).⁷ Under the "nexus" approach, "the government can

⁶ Petitioner's reliance on *Perry v. Sindermann*, 408 U.S. 593 (1972) is misguided. First, that case did not even address the issue of state action. Second, while the Court found that Professor Sindermann had not yet had the opportunity to prove his charge of discrimination, the trial court in the present action ruled that such "discovery . . . would be both purposeless and an unwarranted intrusion upon the individual privacy" of Respondents (Petition at 6a) on these facts.

⁷ In 1984 the NYCHHC and Metropolitan Hospital were dismissed on default from this action without appeal. It is puzzling that Petitioner failed to make
(footnote continued)

be held responsible for the private act only when it has compelled the act by law or when it has 'provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the (government).'" *Miller v. Indiana Hospital*, 562 F.Supp. 1259, 1277 (W.D. Pa. 1983) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The "nexus" approach is not satisfied in the present action since neither Metropolitan Hospital nor the NYCHHC was in any way involved in the decision of the Medical College to terminate Petitioner's position.

In addition, it is clear Petitioner cannot meet the requirements of the "public function" test. The Medical College's provision of medical staff for a city hospital cannot be termed an "exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson*, *supra* 419 U.S. at 352. The Circuits are clearly in agreement that health care, though an essential public service, is not a service traditionally exclusively reserved to the state. *Lubin v. Crittenden Hospital Ass'n.*, 713 F.2d 414, 416 (8th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Modaber v. Culpeper Memorial Hosp., Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982); *Schlein v. Milford Hospital*, 561 F.2d 427, 429 (2d Cir. 1977); *Greco v. Orange Memorial Hospital Corp.*, 513 F. 2d 873, 881-82 (5th Cir.), *cert. denied*, 423 U. S. 1000 (1975).

In his assertion that the Medical College maintains a "symbiotic relationship" with the New York state government, Petitioner relies on three factors: the existence of an affiliation agreement between NYCHHC and the Medical College for provision of certain medical staff at Metropolitan Hospital, the fact that the allegedly discriminatory conduct occurred on public property, and the provision of public funding to the Medical College. Each of these factors, however, is insufficient for a finding of state action.

Petitioner incorrectly interprets the *Burton* ruling, and ignores subsequent law limiting its application. The *Burton* Court

any effort to keep the unquestioned state agency in this action, but now seeks to rely on its presence as the basis for claiming a private institution is a state actor.

specifically declined to undertake the "impossible" task of "fashion[ing] and apply[ing] a precise formula for recognition of state responsibility under the Equal Protection Clause." *Burton*, *supra* 365 U.S. at 722. The Court limited its holding to the facts of the case, stating that "the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." *Id.* at 725. Instead, the Court advocated sifting through the facts and weighing the circumstances in each case to determine whether the degree of state participation in the discriminatory action of a private actor is of the type the Fourteenth Amendment was designed to condemn.

Cases subsequent to *Burton* have explicitly held that the existence of an affiliation agreement or receipt of funds between NYCHHC and a private corporation such as the Medical College does not transform a corporation or its employees into "state actors". See, e.g., *Bannerjee v. Papadakis*, No. 83 Civ. 2262 (E.D.N.Y. June 30, 1986) (doctor employed by private hospital to work in city hospital pursuant to NYCHHC agreement is employee of private hospital, and its employment decision does not constitute state action); *Rakow v. New York Medical College, et al.*, No. 4598/81 (Sup. Ct. N.Y. Co. March 25, 1981) (court held that a dispute between New York Medical College and its employee who worked at Metropolitan Hospital is a dispute between a private employer and employee because the only relationship between the Medical College and NYCHHC is that the Medical College provides medical services to Metropolitan Hospital pursuant to an agreement with NYCHHC); *Wilson v. New York Medical College, et al.*, No. 14016/80 (Sup. Ct. N.Y. Co. September 19, 1980) (fact that NYCHHC funded the Medical College's operation of city-owned hospital does not provide a basis for imposing liability on NYCHHC for employment practices of the College).⁹

Other circuits have arrived at similar results when dealing with like arrangements. In *Sament v. Hahnemann Medical College*

⁹ For the convenience of the Court, copies of these decisions are annexed hereto in the Appendix.

and Hospital, 413 F.Supp. 434 (E.D. Pa.1976), *aff'd mem.* 547 F.2d 1164 (3d Cir. 1977), the court held that the contract of defendant medical school to provide staff to a city hospital in return for a dollar for dollar reimbursement by the city did not constitute state action even under the *Burton* approach. The court noted the lack of evidence that the state "maintains a 'stranglehold'" on the private entity or that it had a potentially significant input in the entity's policies. *Id.* at 441. *See also Kaczanowski v. Medical Center Hospital of Vermont*, 612 F.Supp. 688 (D. Vt. 1985) (no state action present when private hospital also serving as teaching hospital for state university denies plaintiffs staff privileges).

Petitioner argues that the "mutual benefits" conferred by the affiliation agreement on each party renders the Medical College a state actor. This contention is apparently a misinterpretation of the "mutual benefit theory" as a factor. In *Burton*, it was conceded that the private entity, and, in turn, the government, benefitted directly from the discriminatory activity in the form of increased business and profits. 365 U.S. at 724. Subsequent cases interpreting *Burton* have required a showing that the government directly profit from the challenged conduct. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982); *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 451 (1st Cir. 1983); *Greco*, *supra* 513 F.2d at 880; *Johnson v. Southwest Detroit Community Mental Health Services*, 462 F.Supp. 166, 171 (E.D. Mich. 1978). There is no conceivable benefit which NYCHHC could have gained from the alleged discriminatory termination of Petitioner's employment.

Petitioner's reliance on a second element, the fact that the situs of the private conduct is public property, does not establish sufficient state involvement to constitute state action. *See Graseck v. Mauceri*, 582 F.2d 203, 208 (2d. Cir. 1978), *cert. denied sub. nom. Graseck v. Middlemiss*, 439 U.S. 1129 (1979) (the use of public office space by private legal aid corporations under similar affiliation agreements with the government did not detract from the private nature of their actions); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1154 (2d Cir. 1971). *Lubin*, *supra* 713 F.2d

at 416 (actions by private hospitals leasing public property and public buildings did not amount to state action) ; *Greco*, *supra* 513 F.2d at 882-83.

The third factor, receipt of public funds by a private entity, does not convert an otherwise private decision into a state act. *See Blum v. Yaretsky*, *supra* 457 U.S. at 1011; *Rendell-Baker v. Kohn*, *supra* 457 U.S. at 840. This is so even if the private entity receives as much as 90 percent of its budget from public funding. *See Rendell-Baker*, *id.* Even a finding of direct reimbursement of a private entity's salaries does not establish state action. *See Bannerjee*, *supra* at A-10; *Cohen v. President and Fellows of Harvard College*, 568 F.Supp. 658, 661 (D. Mass. 1983) *aff'd*, 729 F.2d 59 (1st Cir.), *cert. denied* 469 U.S. 874 (1984).

A factor further distinguishing *Burton* is that the alleged discrimination here was on the basis of sexual preference. The less stringent "symbiotic relationship" state action standard has been limited consistently to cases involving racial discrimination. *See, e.g. Lubin v. Crittenden Hosp. Ass'n*, *supra* 713 F.2d at 416; *Graseck v. Mauceri*, *supra* 582 F.2d at 208 n.17; *Schlein v. Milford Hospital*, *supra*, 561 F.2d at 428 n.5 (2d Cir. 1977); *Briscoe v. Bock*, 540 F.2d 392, 396 n.3 (8th Cir. 1976); *Granfield v. Catholic Univ. of America*, 530 F.2d 1035, 1046 (D.C. Cir.), *cert. den. sub. nom. Broderick v. Catholic Univ. of America*, 429 U.S. 821 (1976); *Greco v. Orange Memorial Hosp. Corp.*, *supra* 513 F.2d at 879-80; *Giannattasio v. Stamford Youth Hockey Ass'n, Inc.*, 621 F.Supp. 825, 828 (D. Conn. 1985).

"[R]acial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts."

Sament v. Hahnemann Medical College & Hospital, *supra* 413 F.Supp. at 439 n.13.

III

Assuming, *arguendo*, that the Medical College's decision to terminate Petitioner's employment could by some definition be termed state action, Petitioner's claim of a constitutional violation remains unsubstantiated. Petitioner failed to make out a prima facie case of discrimination in the courts below. The trial court, concluding that Petitioner's allegations were "stuff and nonsense" (Petition at 6a), noted that he had offered

no admissible evidence as to the sexual orientation of the individual defendants, relying instead upon his own feelings and inferences. One colleague on the staff of the hospital is thought to be homosexual because he has frequently been heard to complain about his wife

(Petition at 5a-6a). The appellate courts accepted this finding.

Petitioner concedes that the issue of whether homosexuals constitute either a suspect class or quasi-suspect class "need not be decided in the case at bar" (Petition at 22). Respondents agree. While the circuit courts are nearly unanimous in holding that homosexuals do not constitute either a suspect or quasi-suspect class,⁹ this Court has not addressed the issue, *see, Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841, 2850 n.2 (Blackmun, J.,

⁹ *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) *cert. denied*, ____ U.S. ____, 106 S.Ct. 3337, 92 L.Ed. 2d 742 (1986) ("[plaintiff] has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification"); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) ("[a] classification based on one's choice of sexual partners is not suspect"); *De Santis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 327, 333 (9th Cir. 1979) ("[t]he courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals"). One court, without relying on any prior case law concerning classifications based on sexual orientation, has recognized homosexuality as a quasi-suspect class. *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987). This holding appears to be an anomaly in the law and conceptually inconsistent with this Court's recent holding that the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. *Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841, 92 L. Ed. 2d 140 (1986).

dissenting), 92 L. Ed.2d 140 (1986), and need not address it here. The most exacting judicial scrutiny will fail to unearth in the record of this case any evidence that Petitioner was dismissed for being a heterosexual or for any reason other than the Medical College's legitimate need to improve patient care at Metropolitan Hospital. Any determination by this Court that sexual orientation is or is not a suspect class would therefore be superfluous.¹⁰

Petitioner asserts that the test of minimal scrutiny, the rational basis test, governs his termination.¹¹ Under this test, there can be no doubt that the dismissal of Petitioner by the Medical College was justified. In pursuing its legitimate interest of improving patient care through reorganization, the Medical College eliminated all part-time positions in the department in which Petitioner worked. This streamlining was an undeniably rational means of achieving its legitimate end.

Moreover, the Fourteenth Amendment's equal protection prescription only prohibits purposeful discrimination. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Petitioner must, therefore, provide proof that the Medical College had a discriminatory purpose in dismissing him, which he has failed to do on this Record.

Petitioner argues, in essence, that he was a victim of reverse discrimination as a heterosexual in that the Medical College favored retaining and/or hiring homosexuals over heterosexuals.

¹⁰ Respondents understand that this court has granted certiorari in *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), *cert. granted sub. nom. Webster v. Doe*, ____ U.S. ____, 107 S.Ct. 3182, 96 L.Ed.2d 671 (1987), a case which brings up for review the question of heightened judicial scrutiny for a classification based on sexual orientation.

¹¹ Petitioner claims "whatever the right answer may be as to whether civil discrimination against *homosexuals* is unconstitutional, there can be one answer as to whether civil discrimination against *heterosexuals* is unconstitutional" (Petition at 23, emphasis in original). This argument is a complete *non sequitur*: the Fourteenth Amendment has traditionally protected disadvantaged minorities.

Petitioner cannot point, however, to a Medical College regulation that embodies a policy of favoring homosexuals over heterosexuals. Nor has the Petitioner presented any evidence of a covert policy in place at the Medical College of discriminating against heterosexuals. Given the uniform elimination of all part-time positions in the department where Petitioner worked, it strains credulity to suggest that he was singled out and dismissed for a discriminatory reason. In fact, Petitioner's claim is contradicted by the fact that the Medical College offered him — and he rejected — alternative positions of employment prior to his dismissal. Since Petitioner has offered no proof of discriminatory animus, his "equal protection challenge suffers from a fatal threshold deficiency." *Doe v. Devine*, 545 F. Supp. 576, 584 (D.D.C. 1982), *aff'd*, 703 F.2d 1319 (D.C. Cir. 1983).

IV

Petitioner's due process claim may be summarily rejected. It has never been briefed below, and contrary to Petitioner's claim now, it has not been preserved for review. The fact that Petitioner was asked about the basis for claiming a right to a hearing at one point in his deposition (R.662-663), without more, does not preserve the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
February 3, 1988

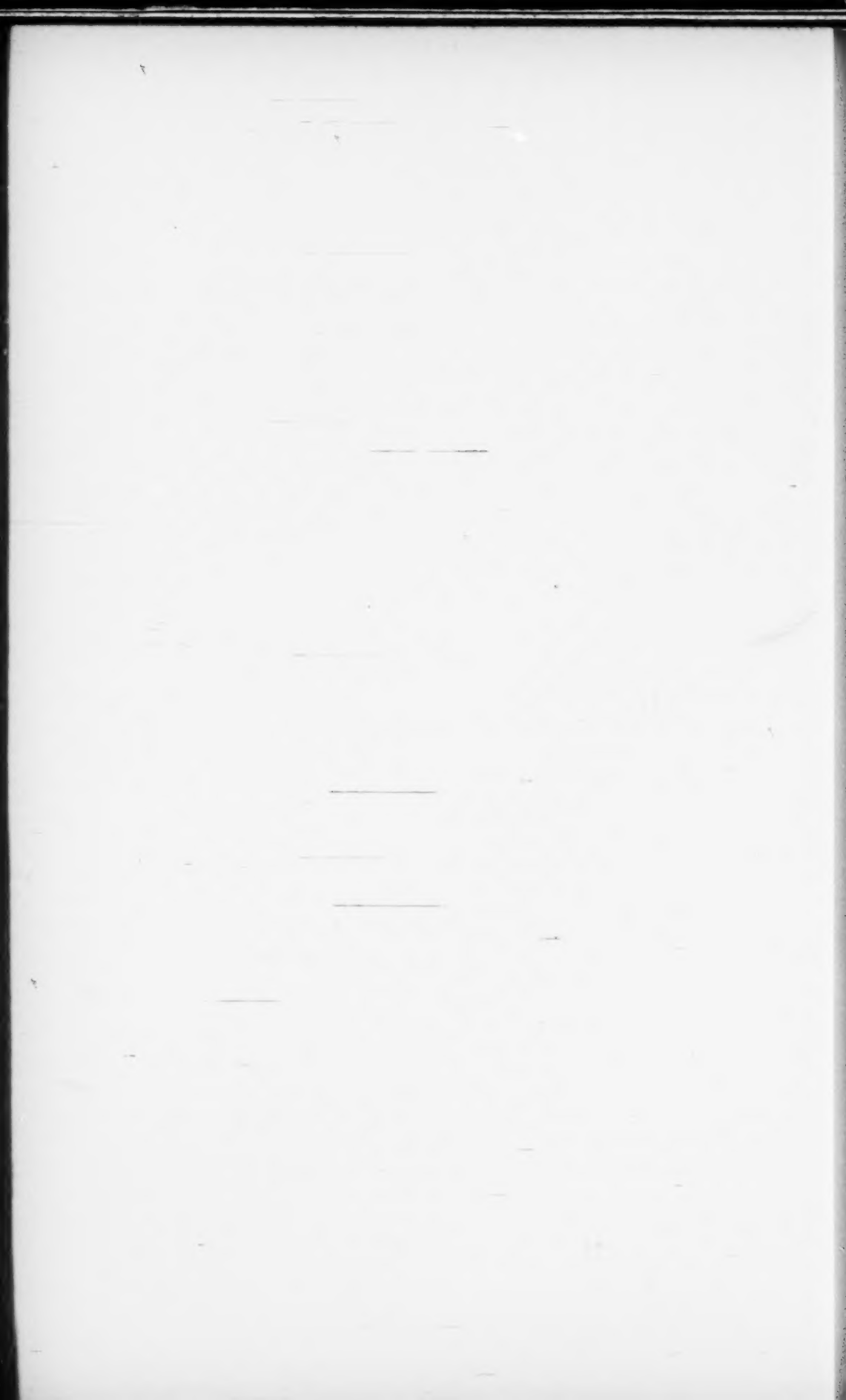
Respectfully submitted,

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APPENDIX



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
JOSEPHINE FLORENCE
BANNERJEE, M.D.,

Plaintiff,

— against —

ORDER
83 CV2262

LYCOURGOS PAPADAKIS, M.D., *et al.*,

Respondent.

----- x

McLAUGHLIN, District Judge

Having carefully reviewed plaintiff's objections, I hereby adopt the attached Report and Recommendation of United States Magistrate Shira A. Scheindlin as the Opinion of this Court. Accordingly, defendants' motions for summary judgment are granted. This disposes of the federal claims under the Civil Rights Act and the Labor Management Relations Act, and I decline to exercise jurisdiction over the pendent state claims. The complaint is therefore dismissed in its entirety.

SO ORDERED

Dated: Brooklyn, New York
June 30, 1986

/s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, USDJ

The Clerk shall make copies of this Order and shall serve them upon the parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
DR. JOSEPHINE FLORENCE
BANNERJEE, M.D.,

Plaintiff,

— against —

LYCOURGOS PAPADAKIS, M.D., et al.,

Defendants.

REPORT AND
RECOMMENDATION
OF UNITED STATES
MAGISTRATE
83 CV 2262
(McLaughlin, J.)

----- X

Plaintiff, Dr. Josephine Bannerjee ("Bannerjee") was employed as a pathologist at Greenpoint Hospital ("Greenpoint") from 1974 to 1980 when she resigned. Plaintiff is now suing the hospital and various other defendants, claiming that her resignation was fraudulently induced. She also claims that in causing her to resign, defendants violated her civil rights. Plaintiff brings this civil rights suit pursuant to 42 U.S.C. §§1983 and 1985 ("1983, 1985"). She also asserts violations of §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a)(1985) and New York's common law of fraud.

In addition to Greenpoint, plaintiff is suing her immediate supervisor Dr. Lycourgas Papadakis ("Papadakis"); Sydney Gerstler ("Gerstler"), the Brooklyn Jewish Medical Center ("BJMC")-Greenpoint Administrative Officer and, Greenpoint's supervisory agency, the New York City Health and Hospitals Corporation ("HHC"). Dr. Bannerjee is also suing the union that represented her, the Association of Salaried Physicians ("ASP" or "Union")¹ and its former president Dr. Cosimo Basirico ("Basirico").² Plaintiff asserts that these defendants fraudulently caused her resignation because she informed HHC's Inspector General that Papadakis had violated HHC rules and because of her sex.³

HHC, Greenpoint, the Union and Basirico have moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56.⁴ They urge that plaintiff has failed to establish the essential elements of a civil rights claim, namely, state action and an official policy or practice. In addition, defendants assert that plaintiff's LMRA claim is time-barred. Finally, they urge the court to dismiss plaintiff's pendent state claim. This case was referred to me by the Honorable Joseph M. McLaughlin for a Report and Recommendation on defendants' motions.

I. STATEMENT OF FACTS

Greenpoint was a municipal hospital owned and operated by HHC.⁵ HHC entered into an Affiliation Agreement ("Agreement") with BJMC, a private, not for profit hospital.⁶ BJMC hired and paid physicians and provided other medical services at Greenpoint and in turn, BJMC was reimbursed for its expenses by HHC.⁷ There is a dispute as to who employed the physicians working at Greenpoint.

Plaintiff began working as a pathologist at Greenpoint in 1974. In 1978 she was promoted to Assistant to the Chief Pathologist, Papadakis. Papadakis was plaintiff's direct supervisor and was responsible for the overall performance of the pathology department including, assigning work and scheduling hours. Early in 1978, technicians at Greenpoint reported to Gerstler, the BJMC administrator at Greenpoint, that Papadakis was violating HHC rules by using Greenpoint facilities for private practice and paying his secretary a full salary though she only worked part time. Papadakis accused plaintiff of reporting the illegal conduct. Soon after, he began to decrease her hours and send her memoranda in which he criticized her performance. Complaint ¶21. Prior to this, plaintiff's competence had never been questioned.

In November 1978, Papadakis reduced plaintiff's position from full time to twenty hours per week. Plaintiff filed a grievance and was represented by ASP, the sole bargaining agent for the professional employees under the Agreement.⁸ As a result,

plaintiff was reinstated to her full time position. Six months later, plaintiff was notified that her hours were again being reduced, this time to thirty hours per week. Although Bannerjee complained to the Union, it took no action on her behalf.

On February 1, 1980, Papadakis further reduced plaintiff's hours to twenty per week. She then filed a complaint with HHC's Inspector General, charging Papadakis with various violations of HHC rules.⁹ At the same time, ASP filed a demand for arbitration to protest the latest reduction in plaintiff's hours.

The arbitration commenced in May, 1980. Papadakis and Gerstler advised the arbitrator that there was no job for plaintiff beginning July 11, 1980 because of budget cutbacks. The arbitration was adjourned so Gerstler could provide the arbitrator with a copy of the HHC budget for Greenpoint. Plaintiff's Affidavit, December 6, 1985 ¶18-20.

On September 3, 1980 plaintiff claims that Mr. Fernandez, the HHC administrator at Greenpoint allowed her to review the 1980-81 budget. According to plaintiff, there was no reduction in the pathology department's budget. *Id.* at ¶21-22.

The arbitration reconvened on September 5, 1980. It was attended by Papadakis, Basirico for ASP, Gerstler for the "Greenpoint Affiliation", David Diamond an administrator for BJMC, plaintiff and her attorney. Papadakis and Gerstler informed Bannerjee that Papadakis refused to work with her. Mr. Diamond showed the arbitrator the 1980-81 budget which apparently revealed that plaintiff's position, Assistant to the Chief of Pathology, had been eliminated. Plaintiff did not challenge the validity of the budget at the arbitration. Thereafter, a settlement agreement was signed on September 5, 1980 by Basirico, Gerstler and plaintiff whereby plaintiff agreed to resign her position and withdraw all charges against Papadakis in return for \$19,000.00, favorable references and a purging of all derogatory material from her personnel file.¹⁰

Plaintiff resigned soon after this arbitration. In December 1980, plaintiff was informed that in October 1980, the position

of Assistant to the Chief of Pathology at Greenpoint was filled. Plaintiff's Affidavit, December 6, 1985 ¶29. Plaintiff maintains that after her termination, she was engaged in informal negotiations with HHC and HHC's attorneys, Corporation Counsel, in an effort to revoke her resignation. Affidavit of Joan Goldberg, attorney for Dr. Bannerjee, September 12, 1985.

III. DISCUSSION

A. Summary Judgment Standards

Defendants have moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(1), (6) or in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56. Because I have considered matters outside the pleadings, the motion will be considered as one for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b).

To prevail on their motions, defendants must prove "that there is no genuine issue as to any material fact," and that they are "entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Harlee v. Hagen*, 538 F.Supp. 389, 393 (E.D.N.Y. 1982). The court must "resolve all ambiguities and draw all reasonable inferences" against the defendants. *American International Group, Inc. v. London American International Corp.*, 664 F.2d 348, 351 (2d Cir. 1981). In addition, all facts asserted by the plaintiff, "if supported by affidavits or other evidentiary material, are regarded as true" for the purpose of these motions. 10A Wright & Miller, Federal Practice and Procedure §2727 (Civil 2d 1983).

Nonetheless, the party who opposes the motion cannot discharge her burden by alleging legal conclusions, nor is she entitled to a trial only on the basis of a hope that she can produce some evidence at that time. *See United Transportation Union v. Long Island Railroad and Metropolitan Transportation Association*, 509 F. Supp. 1300, 1303-1304 (E.D.N.Y.) *rev'd on other grounds*, 634 F.2d 19 (2d Cir. 1980). Further, "[w]hen a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this

Rule, must set forth *specific facts* showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e) (emphasis added). See also *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, *reh. denied*, 393 U.S. 901 (1968); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

B. Defendants' Motions to Dismiss Plaintiff's §1983 Claim

To invoke federal jurisdiction pursuant to §1983 of the Civil Rights Act, plaintiff must demonstrate that defendants deprived her of her constitutional or federal statutory rights *under color of state law*.¹¹ 28 U.S.C. §1343(3)(1983) (emphasis added); *Parrott v. Taylor*, 451 U.S. 527, 532 (1981); *Patterson v. Coughlin*, 761 F.2d 886, 890 (2d Cir. 1985) (appeal pending). Plaintiff asserts that defendants deprived her of her first and fourteenth amendment rights.

1. HHC's and Greenpoint's Motion

Plaintiff attempts to demonstrate state action based on three separate theories. Her first theory is that she was an employee of Greenpoint, a city hospital, which was governed by HHC, a municipal corporation. She reasons that the actions of HHC and Greenpoint constituted state action. Defendants deny that they were Bannerjee's employers or the employers of any of the medical staff working at Greenpoint under the Agreement. Rather, they insist that plaintiff and all medical personnel hired under the Agreement, were employed by the private affiliate hospital, BJMC.

Under the terms of the Agreement, BJMC provided medical staff to work at Greenpoint and was then reimbursed for salaries and benefits by HHC. Although HHC retained the overall responsibility of administering Greenpoint's facilities, BJMC had control over personnel matters including, hiring, firing and general employee-employer relations. Even plaintiff asserts that "BJMC exercised direct control over the personnel services and employee relations" Plaintiff's 9(g) Statement, ¶7.

Several cases have held that HHC's funding of private affiliate hospitals which in turn provide medical personnel at city

hospitals, does *not* convert employees of the affiliate into city employees. See *Fastenberg v. New York City Health and Hospitals Corp., et al.*, No. 156477, (June, 1981, Sup.Ct. Bronx Co.); See also *Wilson v. New York Medical College, et al.*, No. 14016, (September 19, 1980, Sup.Ct. N.Y. Co.) (HHC may not be held liable for employment decisions of private affiliate). In *Rakow v. New York Medical College, et al.*, No. 4595, (August 25, 1981, Sup. Ct. N.Y. Co.), the court stated

there is no question that plaintiff is an employee of the New York Medical College [a private hospital] and not an employee of [HHC] under whose authority and control the Metropolitan Hospital Center [city hospital] operates. The only relation between the two institutions is that New York Medical College provides medical services pursuant to an agreement with the [HHC].

Id. Cf. Scott v. Rockaway Community Corporation; 92 Misc. 2d 178, 179 (Sup. Ct. N.Y. Co. 1977) ("no liability for employment practices may be imposed upon New York City agencies where the agencies do not exercise control over the practices of private independent corporations")

Plaintiff claims that in *Papadakis v. Brezenoff, et al.*, No. 81-2739 (E.D.N.Y. February 2, 1982), the Honorable Mark A. Costantino determined that Dr. Papadakis, a defendant in this case, was an employee of HHC/Greenpoint and thereby found state action. Plaintiff urges the court to follow this determination and conclude that plaintiff too was a city employee. In *Papadakis*, plaintiff alleged that the city and BJMC violated §§1983, 1985 of the Civil Rights Act by terminating his position at Greenpoint without a hearing. Defendants in that case asserted that the court lacked jurisdiction over the termination because there was no state action.

The court in *Papadakis* found state action, not because Papadakis was a city employee, but because there was substantial evidence that HHC and Greenpoint were extensively involved in Papadakis' termination, namely, HHC openly ordered

his removal and despite BJMC's requests, HHC would not permit Papadakis to return to work. As discussed below, there is no evidence of such extensive involvement by HHC in the case at bar. Nowhere in *Papadakis* does the court hold that an employee of an affiliate hospital is a city employee. The basis for the finding of state action was entirely distinct.

As evidence that she was a city employee, plaintiff points out that she filed her complaints about Papadakis with the Inspector General of HHC rather than with BJMC. Because plaintiff's charges against Papadakis were that he was using city facilities for his private practice, it seems reasonable that plaintiff would report this to the city, rather than to BJMC. Thus, plaintiff's filing of charges with the Inspector General cannot alone support her contention that she was a city employee.¹²

Plaintiff has not set forth specific facts in her affidavits or otherwise, to support her claim that she is a city employee so as to create a genuine issue for trial. Fed.R.Civ.P. 56(e). She also has failed to provide any legal basis for this contention. Thus, I respectfully recommend that this court find, as a matter of law, that plaintiff was not a city employee.

Even if this court were to conclude that plaintiff was a municipal employee, plaintiff would still not satisfy the "state action" requirement because she has failed to allege what actions, or lack thereof, were taken by defendants which resulted in the alleged deprivation of her constitutional rights.¹³

Plaintiff claims that HHC and Greenpoint were involved in her supposed "forced resignation" in two respects. First, she contends that they failed to "protect her from retaliation by her employer and in fact joined in an attempted cover-up" Complaint ¶53.¹⁴ Second, she argues that HHC and/or Greenpoint participated in the preparation of the "fraudulent" budget.

In *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983), the court held that in order to support a civil rights action against HHC, a plaintiff must specify which official in the municipal corporation was involved and the scope of that

official's duties. *Id.* at 45. Plaintiff's evidence in opposition to the summary judgment motions fails to name any individual within HHC or Greenpoint who acted or failed to act to encourage plaintiff's resignation. In addition, Bannerjee presents no facts to support the broad allegations against the defendants that they failed to protect her from retaliation and participated in the preparation of a fraudulent budget. See *Black v. United States*, 534 F.2d 524, 527-528 (2d Cir. 1976) (a civil rights plaintiff's failure to provide factual support for her allegations warranted a dismissal of the complaint).

Because plaintiff has failed to establish that she was a municipal employee or that someone within defendants' organizations acted or failed to act in derogation of her constitutional rights, plaintiff's first theory fails to support a finding of state action.

Bannerjee's second theory is that even if she were employed by the private affiliate, state action existed because there was a "sufficiently close nexus between the State [HHC] and the challenged action of the . . . [private] entity [BJMC] so that the actions of the latter may fairly be treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). See also *Gilliard v. New York Public Library System*, 597 F.Supp. 1069, 1074 (S.D.N.Y. 1984).

In order to claim that a private employer's decision should be treated as state action, a plaintiff must prove that the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [act] must be in law deemed that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). State involvement absent direct state responsibility for the alleged deprivation of rights cannot establish state action. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 358.

In *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D.N.Y. 1979), the court stated that plaintiffs must allege with some particularity how the public defendants combined with the private defendants to cause a deprivation of plaintiffs' rights; "vague or conclusory allegations of official participation are

insufficient " *Id.* at 811. Plaintiff in this case makes sweeping allegations against defendants, without ever specifying what in fact HHC/Greenpoint did or did not do in conjunction with BJMC which coerced her to resign. Plaintiff's second theory of asserting "state action" must be rejected because of her failure to specifically allege direct state involvement.

Plaintiff next argues that the requisite state action nexus may be established because HHC fully reimbursed BJMC for salaries and benefits. The Supreme Court has held, however, that a private entity's receipt of government funds or implementation of government policy does not establish a sufficient nexus. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-841 (1982). *See also Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982) (receipt of government funds did not make private non-profit hospital's every act "state action"); *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428-429 (2d Cir. 1977) (no state action unless state procedures and policies play a direct role in private hospital's decision to reject plaintiff's application for staff privileges); *Barrett v. United Hospital*, 376 F. Supp. 791, 802 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974) (a pervasive regulatory scheme may indicate "significant" state involvement but does not satisfy the "nexus" requirement).

Plaintiff's final attempt to establish state action rests on the theory that HHC is responsible for the affiliate's acts because the private hospital "exercised powers traditionally exclusively reserved to the state." *Rendell Baker v. Kohn*, 457 U.S. at 842. Although health care is an essential public service, it is not a service traditionally exclusively reserved to the state. *Modaber v. Culpeper Memorial Hospital Inc.*, 674 F.2d at 1026; *see also Schlein v. Milford Hospital Inc.*, 561 F.2d at 429 (even though the functions performed by a hospital are clearly affected by a public interest, they are not activities traditionally associated with the State's sovereignty); *Barrett v. United Hospital*, 376 F. Supp. at 799 (court refuses to extend public function argument to a private hospital in the absence of a nexus between the government and the violative activity alleged).

Because plaintiff has not demonstrated either the requisite nexus between HHC and the affiliate or that the affiliate was exercising powers exclusively reserved to the state, her second and third theories fail to support a finding of state action. Thus, it is respectfully recommended that HHC and Greenpoint's motion to dismiss plaintiff's §1983 claim be granted.

2. *The ASP and Basirico's Motion*

As noted above, a private party violates §1983 only to the extent its conduct involves state action. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 (1982); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 311, *modified on other grounds*, 520 F.2d 409 (2d Cir 1975).

The only mention of the state's involvement with the Union and Basirico is found in paragraphs twelve and fifty-five of the complaint. Paragraph twelve alleges that the ASP and Basirico conspired with the other defendants "in the destruction of plaintiff's career." Paragraph 55 states that all defendants "through concerted action illegally and fraudulently pressured her to resign in an attempt to remove the threat of discharge . . . from defendant Papadakis."

The complaint and affidavits leaves the Union's and Basirico's involvement with the state "entirely to the court's imagination." *Bannerjee v. Papadakis, et al.*, 583 F. Supp. 757, 761 (E.D.N.Y. 1984) (court dismissed plaintiff's complaint in its entirety, against two private defendants, BJMC's president and its attorney). Absent particularized allegations of how the state combined with the ASP and Basirico, plaintiff's §1983 claim against these defendants cannot stand. *See Weiss v. Willow Tree Civic Association*, 467 F. supp. at 811 (plaintiffs must allege with some particularity how public defendants combined with private defendants to cause a deprivation of plaintiff's rights). Accordingly, it is respectfully recommended that the court grant the ASP and Basirico's motion to dismiss the §1983 claim.

C. *Defendants' Motions to Dismiss The §1985 Claim*

Plaintiff asserts that defendants conspired to deprive her of her fourteenth and first amendment rights in derogation of

§1985. Although some claims under this section may be sustained without state action, *Griffin v. Breckenridge*, 403 U.S. 88 (1971), claims premised on the first and fourteenth amendments require a finding of state action. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 831-833 (1983) (an action under 42 U.S.C. §1985(3) for violations of first and fourteenth amendment rights requires proof of state involvement).

For the reasons set forth above, plaintiff has failed to demonstrate state action. Thus, it is respectfully recommended that defendants' summary judgment motions to dismiss Banerjee's §1985 claims be granted.¹⁰

D. Plaintiff's Request for Additional Discovery

Plaintiff asks the court to grant her additional discovery to enable her to further substantiate her claims under the Civil Rights Act. Affirmation of Joan Goldberg, September 13, 1983 at ¶14.

Plaintiff cannot defeat a motion for summary judgment merely by stating conclusory allegations and "amplifying them only with speculation about what discovery might uncover." *Contemporary Mission Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981). See also *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir. 1978); 10A C. Wright & A. Miller, Federal Practice and Procedure §2739 at 521-522 (Civil 2d 1983).

Plaintiff filed her action in June 1983. She had over two years in which to gather evidence to support her contentions. At this late date, it is unreasonable for plaintiff to be searching for additional evidence to put meat on the bones of her allegations. It is therefore respectfully recommended that the court deny plaintiff's request for additional discovery.

E. Defendants' Motions to Dismiss the §301 LMRA Claims

Plaintiff alleges that HHC, Greenpoint, the ASP and Basirico violated §301 of the LMRA. Section 301 regulates relationships

among employees, their unions and employers. Employees may bring actions against their union for breach of its duty of fair representation and against their employer for its breach of a collective bargaining contract. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 561-62 (1976); *Assad v. Mount Sinai Hospital*, 703 F.2d 36, 40 (2d Cir.) *vacated and remanded on other grounds sub nom.*, 464 U.S. 806 (1983).

1. *HHC and Greenpoint's Motion*

Because HHC and Greenpoint were not plaintiff's employers, and, in addition, plaintiff made no allegation that these defendants violated the collective bargaining agreement, it is recommended that the court grant HHC and Greenpoint's motion to dismiss plaintiff's §301 claim.¹⁷

2. *Union and Basirico's Motion*

Plaintiff alleges that the ASP, acting through Basirico, improperly handled her grievance, thereby breaching the duty of fair representation it owed her. Complaint ¶44-45. The Union argues that plaintiff's claim is barred by the pertinent statute of limitations.

In *Del-Costello v. IBT*, 462 U.S. 151 (1983), the court held that breach of the duty of fair representation suits arising under §301 of the LMRA are governed by the six month statute of limitations in §10(b) of The National Labor Relations Act, 29 U.S.C. §160(b)(1982). *Id.* at 169. Thus, for plaintiff's claim to have been timely, it must have been filed within six months of the date the cause of action accrued. In *Del-Costello*, the court did not discuss when the cause of action accrues in a §301 case. Defendants here claim that plaintiff's rights accrued on the date of the arbitration proceeding at which plaintiff signed the settlement agreement, September 5, 1980. Plaintiff did not commence this action until June 1983.

In *King v. New York Telephone Co.*, 610 F. Supp. 252, 254 (E.D.N.Y. 1985), the court held that §301 claims accrue no later than the time when a plaintiff believed or reasonably should have believed that a breach of the duty of fair representation

occurred. Even if Bannerjee did not believe the duty was breached on the date of the arbitration, surely she should have realized the alleged breach by December 1980 when she admits she found out that a new pathologist had been hired to replace her. Plaintiff's Affidavit, December 6, 1985 ¶29. Thus, plaintiff's action accrued no later than December 1980.

Plaintiff claims that the six month statute of limitations was tolled as a result of negotiations between HHC and herself concerning her reemployment. In *Solis v. Papageorge, et al.*, No. 83-4991 (E.D.N.Y. August 2, 1985), the Honorable I. Leo Glasser held that an employer's informal negotiations with the union, conducted *prior to litigation* regarding plaintiff's reemployment, can toll the six months statute of limitations.

In *Solis*, it was undisputed that the negotiations occurred. In this case, HHC denies engaging in negotiations with plaintiff at any time concerning reemployment. Although on a summary judgment motion, the court is bound to review the record in the light most favorable to the party opposing the motion, that party must "set forth specific facts [in affidavits or other evidentiary material] showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Plaintiff has not supplied the court with facts to support her allegation that negotiations took place prior to the commencement of litigation other than her attorney's assertions that they did in fact occur. The record includes no affidavits or deposition testimony of an individual who allegedly negotiated on HHC's behalf. Plaintiff's own affidavit states

after litigation commenced Corporation Counsel continued to suggest to [plaintiff's attorney] that I send my resume first to Woodhull Hospital and thereafter to Coney Island Hospital. As late as May 1985 [my attorney] advised me that one Elisa Huttner called to suggest that I show my resume to Coney Island Hospital.

Id. at ¶33. Even if these events did occur, they could not toll the statute of limitations because they took place *subsequent* to plaintiff's filing of her action.

Plaintiff's unsupported assertion that there were negotiations prior to the onset of litigation is insufficient to create a genuine issue for trial. It is respectfully suggested that no material question of fact exists as to the tolling of the statute of limitations under §301.

Plaintiff next argues that *Del Costello* should not be applied retroactively. The Second Circuit has squarely held however, that in §301 cases, "a six-month statute of limitations applies both retroactively and prospectively." *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239, 241, (2d Cir.) *cert. denied*, 105 S.Ct. 512 (1984); *See also Assad v. Mt. Sinai Hospital*, 725 F.2d 837, 838 (2d Cir. 1984) (per curiam).

Plaintiff slept on her rights for two and one half years after her cause of action accrued. Thus, the time limitations rule of *Del-Costello* compels this court to respectfully recommend that the Union and Basirico's motion to dismiss plaintiff's §301 claim be granted.

F. Pendent State Claims

Plaintiff also alleges common law fraud against these defendants. The Second Circuit has held that if federal claims are disposed of on summary judgment motions, the court should refrain from exercising pendent jurisdiction. *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176, 1179 (2d Cir. 1974) (Friendly, J.). Because it is recommended that summary judgment be granted to defendants on all the federal claims, it is further recommended that the court, in its discretion, not retain jurisdiction over any state law claims that may remain against these defendants. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

III. CONCLUSION

Because plaintiff has failed to show the existence of a genuine issue for trial either on her claims under the Civil Rights Act of §301 of the LMRA, I respectfully recommend that defendants' motions for summary judgment be granted. I also recommend that this court not retain jurisdiction over plaintiff's pendent state claims as to the moving defendants.¹⁸

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A copy of his Report and Recommendation is being mailed today to all parties, who are hereby advised that objections to the report may be served and filed with the district court, with a copy to me, within ten (10) days of receipt.

/s/Shira A. Scheindlin

Shira A. Scheindlin
United States Magistrate

Dated: Brooklyn, New York
May , 1986

FOOTNOTES

¹ The ASP is no longer in existence as a Union.

² Dr. Basirico died in January, 1985.

³ The complaint is unclear as to the basis for plaintiff's charges of discrimination. Paragraph 56 of the complaint states, "this is a prime example of men joining together to protect one of themselves to the extreme disadvantage of plaintiff who is female." Paragraph 55 states, "all the defendants through concerted action illegally and fraudulently pressured [plaintiff] to resign . . . to remove the threat of discharge . . . from defendant Papadakis." Further, paragraph 53 notes that defendants retaliated against her for her actions. In civil rights actions, pleadings should be liberally construed. *Windsor v. Bethesda General Hospital*, 523 F.2d 891, 893 (8th Cir. 1975); *Holloway v. Carey*, 482 F. Supp. 551, 553 (S.D.N.Y. 1979). Thus, the court construes the complaint as alleging both sex and "whistle blowing" discrimination.

⁴ In *Bannerjee v. Papadakis, et al.*, 583 F. Supp. 757 (E.D.N.Y. 1984), Judge McLaughlin dismissed plaintiff's complaint against Jay Kriegal, president of BJMC and David Diamond, attorney for BJMC. Gerstler has never appeared in this action. Although Dr. Papadakis has submitted a letter and an affidavit in connection with these motions, he has not formally moved to dismiss or for summary judgment. See footnote 18, *infra*.

⁵ Greenpoint was closed in the fall of 1982.

⁶ BJMC has filed for bankruptcy under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 *et seq.*

⁷ The actual Affiliation Agreement between HHC and BJMC was never signed. The parties agree, however, that HHC and BJMC were operating under the terms of the unsigned Affiliation Agreement.

⁸ The Union claims that it was not certified as a collective bargaining agent under the State Bargaining Act because it was dealing with BJMC a private hospital. Transcript of Hearing on Motions ("Tr.") at 22.

It should be noted that the collective bargaining agreement between Greenpoint, BJMC and ASP states that employees may not be removed except for cause.

⁹ Dr. Papadakis was in fact terminated from his position.

¹⁰ The settlement agreement is attached to the complaint.

On September 18, 1980, plaintiff informed the Inspector General that despite her promise in the settlement agreement to withdraw the charges against Dr. Papadakis, she in fact would not withdraw the allegations.

¹¹ The statutory requirement of action "under color of state law" under the civil rights statute and the "state action" requirement of the Fourteenth Amendment are identical. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929, 931 (1982). Thus, these terms will be used interchangeably throughout this Report and Recommendation.

¹² In ¶53 of the Complaint, plaintiff asserts that HHC and Greenpoint failed and refused to protect her from retaliation *by her employer* (emphasis added). This indicates that she herself considered Papadakis or BJMC to be her employer.

¹³ It must be noted that neither HHC nor Greenpoint were represented at the arbitration proceedings.

¹⁴ It seems unlikely that these defendants sought to terminate plaintiff due to the accusations she made against Papadakis since it was HHC that terminated Dr. Papadakis based on plaintiff's complaints.

¹⁵ Plaintiff cites *Lombard v. Eunice Kennedy Shriver Center For Mental Retardation, Inc.*, 556 F. Supp. 677, 678-9 (D. Mass. 1983) which held that a private organization's contractual role in providing medical care for involuntarily committed residents of state mental institutions amounted to state action. There is a distinct difference between providing hospital care to patients who are not compelled to enter a particular hospital and providing care to patients who have been involuntarily committed by the state to a particular state hospital.

¹⁶ Even if plaintiff had established state action, her §1985 claim could not stand. Her complaint alleges nothing more than that defendants conspired to force her to resign. This Circuit has repeatedly held that complaints containing only conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss. *Contemporary Mission Inc. v. U.S. Postal Service*, 648 F. 2d 97, 107 (2d Cir. 1981); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977).

¹⁷ Neither HHC nor Greenpoint were parties to the collective bargaining agreement.

¹⁸ It is further recommended that plaintiff's complaint against Dr. Papadakis be dismissed sua sponte for failure to state a claim. Dr. Papadakis was an employee of BJMC. No civil rights claim or §301 claim would lie against him for the reasons set forth in this opinion. It is well settled that the district court may dismiss a complaint sua sponte for failure to state a claim. *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d cir. 1980) (citing *Robins v. Rarback*, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974 (1965)); *Dahlberg v. Becker*, 581 F. Supp. 855, 863 (N.D.N.Y.), *aff'd*, 748 F.2d 85 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1845 (1985).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

----- x
RAYMOND W. RAKOW, M.D.,

Plaintiff,

— against —

NEW YORK MEDICAL COLLEGE; JOSEPH A. :
CIMINO, M.D., as President, New York Medical :
College; SAMUEL RUBIN, M.D., as Dean, New :
York Medical College; VICTOR TEICHNER, :
M.D., individually and as Chief of Service, Depart- :
ment of Psychiatry, Metropolitan Hospital Center; :
ALFRED FREEDMAN, M.D., individually and as : INDEX
Chairman, Department of Psychiatry, New York NO.
Medical College; NEW YORK CITY HEALTH : 4595/81
AND HOSPITALS CORPORATION; ABRAHAM :
KAUVER, M.D., as President, New York City :
Health and Hospitals Corporation; CARLOS :
LORAN, as Acting Executive Director, Metro- :
politan Hospital Center, MEDICAL BOARD :
OF METROPOLITAN HOSPITAL CENTER; :
CAMILLE MALLOUH, M.D., as President of the :
Medical Board, Metropolitan Hospital Center, :

Defendants.

----- x
BLYN, J.:

Motion by plaintiff, brought on by order to show cause, seeks an order enjoining, restraining and prohibiting defendants from reassigning plaintiff from his position as Director of the Division of Liason and Consultation in the Department of Psychiatry at Metropolitan Hospital Center unless they first comply with the procedures in the By Laws of the Medical Staff and Medical Board, harassing, retaliating against or maligning plaintiff; or subjecting him to increased surveillance or rules which have not

been applied to him before May, 1981 (sic); or consenting to or condoning any of the foregoing activities on the part of other individuals associated with or agents of New York Medical College; permitting, condoning or ignoring the reassignment, transfer, discharge, demotion, alteration in duties or functions, or discipline of plaintiff without requiring compliance with the procedures in the By Laws of the Medical Staff and Medical Board.

There is no question that plaintiff is an employee of the New York Medical College and not an employee of the Health and Hospitals Corporation under whose authority and control the Metropolitan Hospital Center operates. The only relation between the two institutions is that New York Medical College provides medical services pursuant to an agreement with the Health and Hospitals Corp.

In light of these facts the By Laws and Regulations of the Medical Staff and Medical Board of the Metropolitan Hospital do not apply to the dispute between the plaintiff and his employer New York Medical College.

What remains thus is the dispute between management of a private hospital and an employee.

In considering an application for a preliminary injunction one must look to the following elements.

1. Is there a likelihood of success in the underlying causes of action (which seek a permanent injunction)?
2. Will plaintiff sustain irreparable harm if his application is denied?
3. Is there an adequate remedy at law?

As to the first element the court does not believe that there is a likelihood of success. Decisions as to the administration of a private hospital are best left to management and the courts should not interfere with internal management of such a hospital.

As to the second item — the assignment to which plaintiff objects has already been made and thus there is no status quo to maintain. If the plaintiff is seeking to undo what has been done and asks the court to restore him to his previous status he is asking for a writ of mandamus which is not available as to private parties.

As to the third element plaintiff is seeking an award of \$1,500,000 and other dollar damages and thus has a remedy at law.

For the foregoing reasons the motion for a preliminary injunction is denied.

This decision shall constitute the order of the court.

Dated: March 25, 1981

ARTHUR E. BLYN
J.S.C.

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM PART I

----- x
OSWALD WILSON,

Petitioner, :

For a Judgment pursuant to Article 78 of :
the CPLR, :

— against —

Index No.
: 14016/1980

NEW YORK MEDICAL COLLEGE,
NEW YORK CITY HEALTH &
HOSPITALS CORP. and NORMAN C.
PFEIFFER,

: Motion No. 53
of September 4,
: 1980

Respondents. :

----- x
FRAIMAN, J.:

Motions numbered 53 and 130 of the calendar of September 4, 1980 are consolidated for disposition. Petitioner was the Blood Bank Supervisor at Lincoln Hospital in New York City. He was discharged in May, 1980 and by this Article 78 proceeding he seeks to be reinstated to his position. Respondents are the New York Medical College (the College) of which Lincoln Hospital, a municipal hospital, is an affiliate; the New York City Health and Hospitals Corporation (HHC), which reimburses the College for its expenses in providing medical services for Lincoln Hospital; and Dr. Norman C. Pfeiffer, Chief of Pathology at Lincoln Hospital, who allegedly was responsible for petitioner's dismissal. Basis for the petition is the contention that petitioner was dismissed because he is black and his discharge was without a hearing. Prior to commencing the instant proceeding petitioner filed a complaint against the College with the New York State Division of Human Rights in which he alleged that he was discharged because of his race, and that complaint is currently pending.

Respondents have cross-moved to dismiss the petition on the ground that it fails to state a cause of action. With respect to HHC, it contends that the petition must be dismissed as to it because it has no authority over, or responsibility for, the College's hiring and firing of its staff. Petitioner concedes that at the time of his discharge he was on the payroll of the College, but argues that HHC is a proper party to this proceeding because it reimbursed the College for his salary and that of the other members of Lincoln pursuant to the affiliation agreement between HHC and the College, whereby the College undertook, commencing July 1, 1979, to provide medical services at Lincoln. However, inasmuch as no evidence has been offered that HHC was involved in any way in petitioner's dismissal, the fact that HHC funded the College's operation of Lincoln does not provide a basis for imposing liability on HHC for the employment practices of the College. See *Matter of Scott v. Rockaway Corp.*, 92 Misc.2d 178 (Sup.Ct. N.Y.Co. 1977); *Matter of Clancy v. Trustees of Columbia University*, 66 Misc.2d 356 (Sup.Ct. N.Y. Co. 1971). Accordingly, the petition as to HHC is dismissed.

The petition against the College and Dr. Pfeiffer must also be dismissed. As indicated above, prior to the commencement of this proceeding, petitioner filed a complaint against the College with the New York State Division of Human Rights, charging that he was dismissed because of his race. Section 297(9) of the Executive Law permits an individual aggrieved by an unlawful discriminatory practice to bring an action in a court of appropriate jurisdiction unless such person has filed a complaint with the Human Rights Division. In such case, Section 300 provides that the proceeding before the Division, while pending, shall be exclusive. Accordingly, the instant proceeding cannot be maintained at this time. See *Emil v. Dewey*, 49 N.Y.2d 968 (1980). Settle judgment.

Dated: September 19, 1980.

s/
J.S.C.

No 87-1127

Supreme Court, U.S.

FILED

FEB 23 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

against

NEW YORK MEDICAL COLLEGE, INC., KARL P.
ADLER, M.D., PHILIP HENIG, M.D., and
KURT ALTMAN, M.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY BRIEF

(PROFESSOR) CYRIL C. MEANS, JR.
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(212) 431-2198

February 23, 1988

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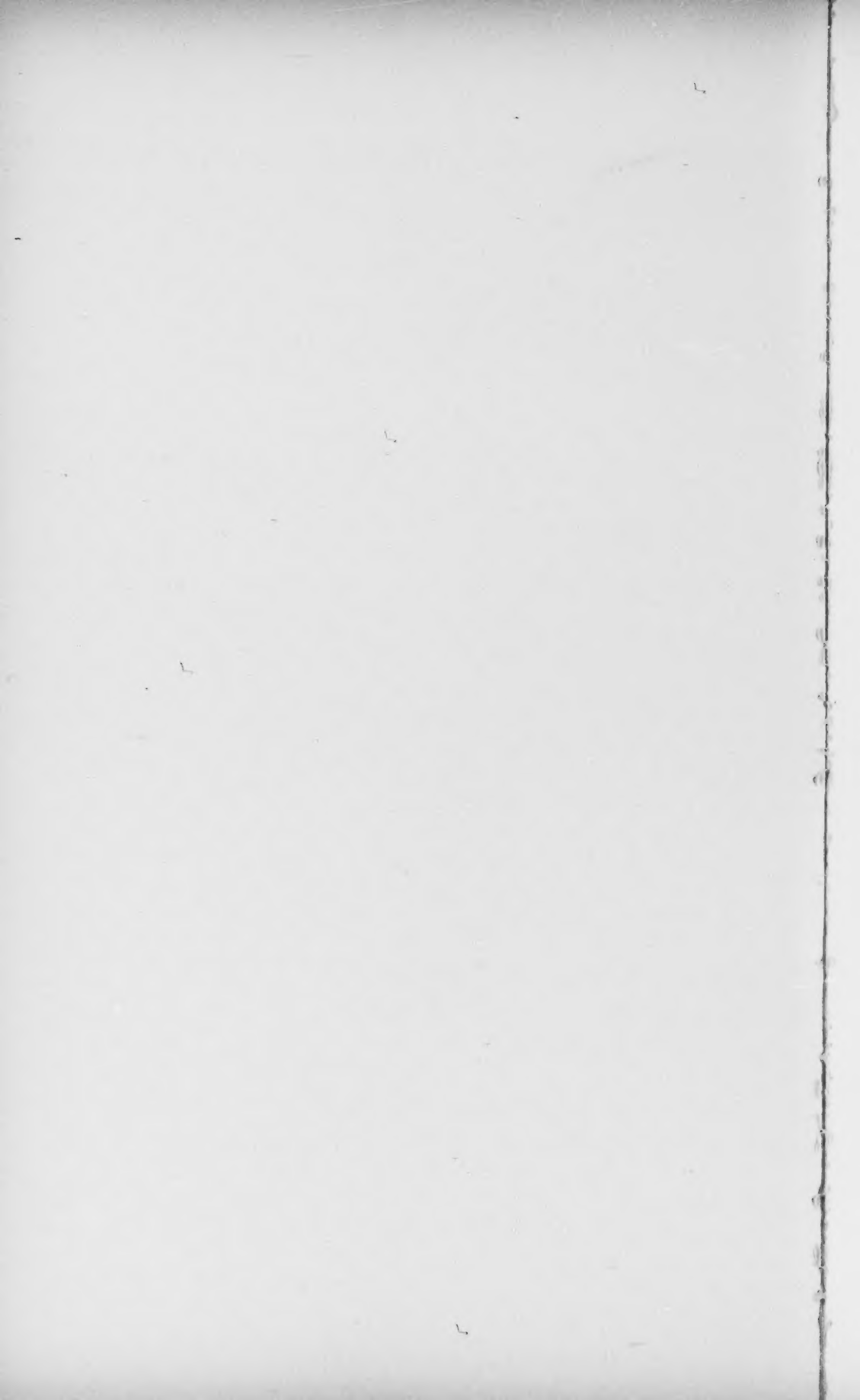
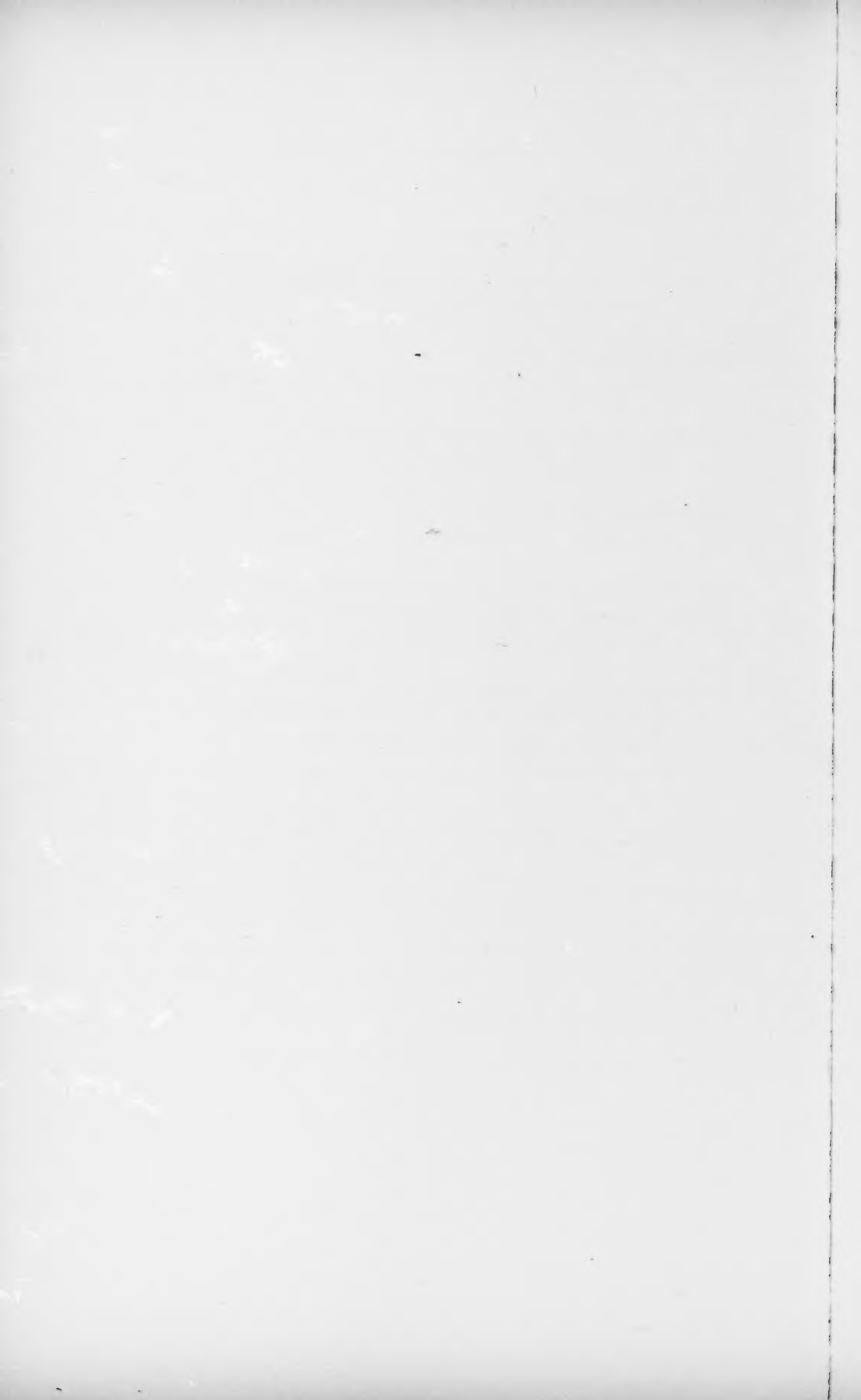


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IN THE
SUPREME COURT OF THE UNITED STATES
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STANISLAW KONARSKI, M.D.,

Petitioner,

against

NEW YORK MEDICAL COLLEGE, INC.,
KARL P. ADLER, M.D.,
PHILIP HENIG, M.D., AND
KURT ALTMAN, M.D.

Respondents.

On Petition for a Writ of Certiorari to the New York
Supreme Court, Appellate Division, First Department

PETITIONER'S REPLY BRIEF

In their Brief in Opposition, Respondents attempt to show that Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), has been limited by three later decisions of this Court: Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); and

Blum v. Yaretsky, 457 U.S. 991 (1982). These later cases do not limit Burton: they deal with a different situation. Burton dealt with a public restaurant on public property. The later cases concerned private activities on private property.

Interestingly, Respondents make no mention of this Court's most recent case dealing with state action: San Francisco Arts and Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987), but instead resorted to a gaggle of lower court opinions, some even unreported. In the Olympic Committee case, there was a 5 to 4 division, the majority concluding that there was no state (i. e., Federal) action, while the dissenters considered that there was. Four Justices thought that, under Burton, Federal action was present. Both the majority and the dissenting opinions (107 S. Ct. at 2984-87, and 2991-93) discussed the post-Burton cases on which Respondents herein rely. The majority did not discuss Burton, while the dissenters relied on it.

In the Olympic Committee case, as in the

others that have followed Burton, the use of public property was not present. Had it been, one senses that one or several of the Justices in the Olympic Committee majority might also have found Burton controlling.

Respondents also rely on certain lower courts' perceptions (Br. in Opp. 11) that symbiotic state action is more easily found where the alleged discrimination is based on race than on sexual orientation. If such a distinction existed, surely the Olympic Committee Court would not have passed it over in silence.

Respondents also state, inaccurately, that "Petitioner asserts that the test of minimal scrutiny, the rational basis test, governs his termination" (Br. in Opp. 13, misquoting, in n. 11, Petitioner's statement (Pet. 23) by leaving out the word "only"). A close reading of Petitioner's statement (Pet. 23) shows that Petitioner was not proposing a standard of scrutiny, but merely remarking that even the minimal one, if applied to discrimination against heterosexuals, would result in unconstitutionality. It is likely that a higher standard of scrutiny will be found to be appropriate.

Respondents' further statement that Petitioner's argument "is a complete non sequitur: The Fourteenth Amendment has traditionally protected disadvantaged minorities" (Br. in Opp. 13 n. 11) both ignores the fact that some equal protection claims by members of majorities have been upheld and the further fact that, by the time of Petitioner's discharge, according to his claim, power in his department had shifted into the hands of a homosexual clique, so that it was he, Petitioner, as a heterosexual, who was disadvantaged.

Since the Petition was docketed, there has been another decision on the question whether homosexuals constitute a suspect or quasi-suspect class for equal protection component purposes: Watkins v. U.S. Army, No. 85-4006 (D.C. No. CV 81-1065R), 9th Cir., Feb. 10, 1988, slip op. at pp. 1773-1841 (2:1). That distinguished court divided on this question. One may well wonder, however, whether service in the military or in the intelligence service does not introduce a factor which might point the balance differently from what would be appropriate in a case (as at bar) of civilian professional em-

ployment.

Respondents complain (Br. in Opp. 6) that, though they themselves "submitted into the record" the affiliation agreement, Petitioner should not now be allowed to rely on § 5.07 thereof (the clause that prohibits discrimination based on sexual orientation). It scarcely lies in Respondents' mouths to try to exorcise a text that they invited the courts and their adversaries to examine. The case which they cite as authority for their contention that § 5.07 "should not now be considered" -- Butterworth v. Bowen, 796 F. 2d 1379, 1387 (11th Cir. 1986) (Br. in Opp. 6) -- is the reverse of the case at bar. On the very page they cite, that court states that there reliance was attempted on "evidence that is not part of the record."

Respondents also complain of Petitioner's reliance on "provisions of the N.Y. Unconsolidated Laws" (Br. in Opp. 6), although it was Respondents who brought those very provisions to the attention of the court below. In any case, a statute is entitled to judicial notice.

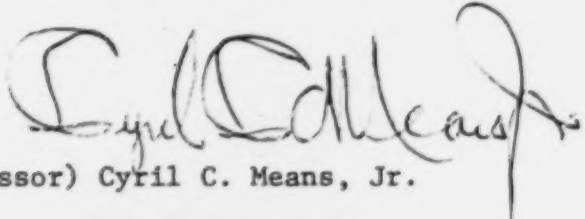
Respondents have also asserted as facts statements which Petitioner is prepared to prove untrue, and, but for the trial court's grant of summary judgment before Petitioner had the opportunity to depose Respondents and other witnesses, he would have proved untrue. Thus, the assertion that Respondent Henig offered Petitioner "a comparable position" (Br. in Opp. 3) is not true: the position was not in fact comparable. And the further assertion that Petitioner rejected another offer, to work full-time in the ambulatory care center (Br. in Opp. 3) is also untrue: no such offer was ever made. Likewise, the assertion that the Medical College "eliminated all part-time positions in the department in which Petitioner worked" (Br. in Opp. 13) is untrue. To Petitioner's knowledge, at least three such part-time positions were not eliminated.

All these disputes as to facts are irrelevant, except as showing that summary judgment should not have been granted, and a trial should have been held to resolve them.

CONCLUSION

For the reasons set forth in the Petition,
and for the further reasons set forth in this Reply
Brief, it is respectfully submitted that the Petition
for a Writ of Certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Cyril C. Means, Jr.", with a large, stylized flourish extending from the end of the name.

(Professor) Cyril C. Means, Jr.

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Counsel for Petitioner

February 23, 1988.